

2016

The Hidden World of Unconscious Bias and its Impact on the "Neutral" Workplace Investigator

Ashley Lattal

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

 Part of the [Labor and Employment Law Commons](#), and the [Law and Psychology Commons](#)

Recommended Citation

Ashley Lattal, *The Hidden World of Unconscious Bias and its Impact on the "Neutral" Workplace Investigator*, 24 J. L. & Pol'y (2016).
Available at: <https://brooklynworks.brooklaw.edu/jlp/vol24/iss2/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

THE HIDDEN WORLD OF UNCONSCIOUS BIAS AND ITS IMPACT ON THE “NEUTRAL” WORKPLACE INVESTIGATOR

*Ashley Lattal**

Workplace investigations into complaints of harassment, discrimination, and other allegations of workplace misconduct have become a critical method for employers to establish that they have complied with certain obligations to provide a discrimination-free workplace. As a result, the fairness and effectiveness of the workplace investigation process utilized by employers has increasingly come under judicial scrutiny. The nature of workplace investigations rests upon the assumption and expectation that workplace investigators are capable of being impartial in making findings of fact. For this reason, courts have identified the impartiality of the investigator as a key tenet of a fair and effective workplace investigation.

Yet, mounting scientific evidence indicates that our automatic cognitive biases unconsciously steer us towards biased behavior. Such unconscious biases present a significant hurdle to attaining true impartiality and are likely to impact the workplace investigator’s role.

Workplace investigators, who are not specifically regulated, must educate themselves as to the potentially detrimental impact such biases can have at each stage of the process and make

* Ms. Lattal is a founding partner of Shearer Lattal LLP, a Toronto firm specializing in workplace investigations, workplace mediations, and training. Ms. Lattal is a graduate of Cornell Law School (2000) and is called to the bars of New York, Washington, D.C., and Ontario. She began her career practicing in commercial litigation at a national law firm in Washington, D.C. and subsequently moved to a litigation boutique where she developed an employment law practice. She recently obtained an LL.M. in Alternative Dispute Resolution from York University’s Osgoode Hall Law School in Toronto.

conscious and consistent efforts to reduce that impact. While unconscious biases can be difficult to overcome, workplace investigators can employ bias reduction strategies to attempt to ensure that hidden biases do not taint their conclusions.

After exploring the workplace investigation process and the critical role of neutrality in workplace investigations this article examines the emerging research in the science of unconscious bias. It then discusses court cases in which bias has or may have impacted the processes and outcomes of workplace investigations. This article concludes by proposing possible solutions to the problem of unconscious biases in conducting workplace investigations.

INTRODUCTION

Workplace investigations occupy an increasingly important role in identifying, understanding, and addressing workplace conflict. Indeed, workplace investigations into complaints of harassment, discrimination, and other workplace misconduct are a critical method for employers to establish that they have complied with certain obligations, such as their “obligation to ensure a discrimination-free work environment.”¹ As a result, the fairness and effectiveness of the workplace investigation process utilized by employers has increasingly come under judicial scrutiny.² Workplace investigators are tasked with making findings of fact that may have an impact on the reputation and livelihood of individual

¹ *Northrop Grumman Corp. v. Worker’s Comp. Appeals Bd.*, 127 Cal. Rptr. 2d 285, 296 (Cal. Ct. App. 2002); *see also* U.S. EEOC, ENFORCEMENT GUIDANCE ON VARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, EEOC NOTICE 915-002 (June 18, 1999) [hereinafter EEOC ENFORCEMENT GUIDANCE], <http://www.eeoc.gov/policy/docs/harassment.html>.

² *See* STEWART S. MANELA, WORKPLACE INVESTIGATIONS 3, http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/ac2009/107.authcheckdam.pdf. “Employment practices experts frequently testify regarding what constitutes reasonable investigation, and critique employers’ investigations. Consequently, employers are increasingly being called upon to explain and justify their investigatory techniques as reasonable and appropriate in the face of these expert opinions.” *Id.* at 3 n.4. Cases considering the reasonableness of workplace investigations are discussed further below in this Article.

workers.³ The nature of workplace investigations rests on the assumption and expectation that workplace investigators can make impartial findings of fact.⁴ Courts have therefore identified the impartiality of the investigator as a key tenet of a fair and effective workplace investigation.⁵

In recent years, however, mounting psychological evidence has suggested that achieving true impartiality requires more than simply utilizing fair processes and ensuring there are no ties to the parties involved.⁶ The research indicates that automatic cognitive biases are

³ See *id.* at 3; SUBCOMM. OF THE EMP'T RIGHTS & RESPONSIBILITIES COMM., AM. BAR ASS'N, 2013 REPORT OF THE WORKPLACE INVESTIGATIONS 3 (2013), http://www.americanbar.org/content/dam/aba/events/labor_law/2013/03/employment_rightsresponsibilitiescommitteemidwintermeeting/19_workplace.authcheckd.kdam.pdf (“The court also opined that the investigation lacked the ‘careful, systematic assessments of credibility one would expect in an inquiry on which an employee’s reputation and livelihood depended.’” (quoting *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843 (D.C. Cir. 2006))).

⁴ See generally EEOC ENFORCEMENT GUIDANCE, *supra* note 1 (“An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment.”); ASS’N OF WORKPLACE INVESTIGATORS, GUIDING PRINCIPLES FOR INVESTIGATORS CONDUCTING IMPARTIAL WORKPLACE INVESTIGATIONS, (Sept. 25, 2012) [hereinafter GUIDING PRINCIPLES], <http://www.aowi.org/assets/documents/guiding%20principles.pdf> (“Guiding Principle: The investigator should be impartial and objective, and have the necessary skills and adequate time to conduct the investigation.”). For purposes of this Article, the terms “impartial,” “neutral,” and “unbiased” are used interchangeably. The meaning of these terms is discussed *infra* in Part II.B.

⁵ See, e.g., *Ribeiro v. Can. Imperial Bank of Commerce*, 1989 CanLII 4281 (Can. Ont. S.C.); *Tong v. Home Depot of Can. Inc.*, 2004 CanLII 18228, para. 11–12 (Can. Ont. S.C.) (discussing the investigatory flaw of the floor manager’s “untrained investigation methods,” where he “began his examination of [the plaintiff]’s actions and movements with the firm belief that the plaintiff was a wrongdoer”); *Reeves v. Safeway Stores*, 16 Cal. Rptr. 3d 717 (Cal. Ct. App. 6th 2004) (reversing summary judgment for a defendant employer where the evidence “supports an inference that . . . [the] investigation of the alleged misconduct was not truly independent”); *Nazir v. United Airlines*, 100 Cal. Rptr. 3d 296 (Cal. Ct. App. 1st 2009) (reversing summary judgment for a defendant employer where the investigation into discrimination claims was a “far cry” from impartial or thorough, thus “raising a triable issue whether the investigation was . . . appropriate”); *Quela v. Payco-General Am. Credits, Inc.*, 84 F. Supp. 2d 956 (N.D. Ill. 2000).

⁶ See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006) (discussing the new

deeply embedded within the human psyche, often run contrary to our explicit beliefs, and unconsciously steer us towards biased behavior and conclusions.⁷ Such unconscious biases are likely to impact the most important functions of workplace investigators, including evaluation of witnesses and evidence, assessment of behavior, recollection of facts, and judgment of wrongdoing. Investigators may reach conclusions not on the basis of seemingly strong objective evidence, but instead by unwittingly following cognitive biases of which they are often unaware.⁸

Workplace investigators should understand the potentially detrimental impact such biases can have at each stage of the process and make conscious efforts to reduce that impact. Understanding these biases may be particularly important for workplace investigators who investigate discrimination claims made by disadvantaged groups—groups against which most of us have strong unconscious biases that often run contrary to our explicit beliefs.⁹ While unconscious biases can be difficult to overcome, workplace investigators can employ bias reduction strategies to help to eliminate the effects of unconscious biases in their conclusions.

Part I will explore the workplace investigation process, the critical role of neutrality in the investigation process, and the largely unregulated nature of the profession. Part II then examines relevant developments in the science of unconscious bias. Part III will discuss cases in which bias has or may have impacted workplace investigations. Part IV will propose possible solutions to the problem of unconscious biases in conducting workplace investigations. Understanding unconscious biases and strategies designed to reduce them can help to enhance the neutrality of workplace investigations.

science of unconscious mental processes and how humans do not always have conscious, intentional control over their mental processes that motivate their actions); AMY OPPENHEIMER, *THE PSYCHOLOGY OF BIAS: UNDERSTANDING AND ELIMINATING BIAS IN INVESTIGATIONS* (2012), http://amyopp.com/wp-content/uploads/2013/07/Psychology_of_Bias_May_2012.pdf (discussing the impact unconscious biases can have on investigators).

⁷ See, e.g., Greenwald & Krieger, *supra* note 6.

⁸ See generally OPPENHEIMER, *supra* note 6 (discussing the impact bias can have on investigators).

⁹ See *id.* at 2 (discussing bias against disadvantaged groups).

I. OVERVIEW OF THE WORKPLACE INVESTIGATION PROCESS AND THE CRITICAL ROLE OF NEUTRALITY

A. *The Workplace Investigation Process*

A workplace investigation is a process whereby an employer, either internally or through an independent investigator, engages in fact-finding to determine whether certain types of workplace misconduct have or have not occurred.¹⁰ Employers utilize workplace investigations to respond to a variety of workplace misconduct, including allegations of harassment, discrimination, threats or incidents of violence, unprofessional or inappropriate workplace behavior, theft, and inappropriate use of company information or assets.¹¹ In most cases, an internal complaint triggers the investigation.¹²

Allegations of discrimination and harassment are amongst the most common types of complaints requiring investigation.¹³ An employer has a duty to provide a workplace free of discrimination and harassment by taking “all reasonable steps to prevent harassment and discrimination from occurring.”¹⁴ In order for an employer to meet its obligations in this regard, it must promptly, thoroughly, and impartially investigate complaints of

¹⁰ See generally SOC’Y OF CORP. COMPLIANCE & ETHICS, GUIDE TO CONDUCTING WORKPLACE INVESTIGATIONS (2008), www.corporatecompliance.org/Portals/1/Users/169/29/60329/Workplace_Investigations_Guide.pdf (explaining that a workplace investigation involves fact-finding to determine whether misconduct has occurred).

¹¹ GARETH JONES, CONDUCTING ADMINISTRATIVE OVERSIGHT & OMBUDSMAN INVESTIGATIONS 1, at 1 (2009); Manela, *supra* note 2, at 2.

¹² FRAN A. SEPLER, FINDING THE FACTS: WHAT EVERY WORKPLACE INVESTIGATOR NEEDS TO KNOW, at xi (2008).

¹³ See, e.g., Press Release, U.S. Equal Emp. Opportunity Comm’n, EEOC Releases Fiscal Year 2015 Enforcement and Litigation Data (Feb. 11, 2016) <http://www1.eeoc.gov/eeoc/newsroom/release/2-11-16.cfm> (providing “detailed breakdowns of the 89,385 charges of workplace discrimination” the EEOC received during the 2015 fiscal year, of which charges alleging harassment “made up nearly 28,000 charges, or 31%”).

¹⁴ Northrop Grumman Corp. v. Worker’s Comp. Appeals Bd., 127 Cal. Rptr. 2d 285, 296 (Cal. Ct. App. 2d 2002) (quoting Cal. Gov’t Code § 12940 (West 2016)).

discrimination, harassment, and retaliation.¹⁵ While an investigation may not be necessary in all cases, employers who fail to conduct reasonable and appropriate investigations run the risk of critically damaging their legal position in the event that a party to the investigation subsequently commences a lawsuit.¹⁶

Although the workplace investigation process can vary somewhat depending on company policy, an individual investigator's preferences, or the circumstances of the particular case, it generally entails interviewing the complainant(s), respondent(s), and relevant witnesses, and reviewing evidence to make findings of fact about the workplace incident.¹⁷ There is much

¹⁵ See EEOC ENFORCEMENT GUIDANCE, *supra* note 1 (“An anti-harassment policy and complaint procedure should contain, at a minimum . . . [a] complaint process that provides a prompt, thorough, and impartial investigation [among other elements].”); Cal. Gov’t Code § 12940(j)(1), (k) (West 2016); *Northrop Grumman*, 127 Cal. Rptr. 2d at 296 (“The employer’s duty to prevent harassment and discrimination is affirmative and mandatory . . . Prompt investigation of a discrimination claim is a necessary step by which an employer meets its obligation to ensure a discrimination-free work environment.” (citations omitted)); *see also* *Malik v. Carrier Corp.*, 202 F.3d 97, 105 (2d Cir. 2000) (“[A]n employer’s investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer’s failure to investigate may allow a jury to impose liability on the employer.”); Melanie A. Kastl & Brian H. Kleiner, *Bias in Workplace Investigations and How to Minimize It*, 25 MGMT. RES. NEWS 227, 227–31 (2003).

¹⁶ *See, e.g.*, *Elgert v. Home Hardware Stores Ltd.* (2011) 510 A.R. 1, para. 86–89 (Can. Alta. C.A.); *see also* CHRISTINE THOMLINSON ET AL., INVESTIGATING ALLEGATIONS OF HARASSMENT AND WORKPLACE VIOLENCE: PRACTICAL CONSIDERATIONS (June 2012), https://kmlaw.ca/wp-content/uploads/2015/09/AH_InvestigatingAllegationsofHarassment1_JUN_6_12-1.pdf (“A seriously flawed or negligent investigation can be significant and costly to employers.”).

¹⁷ *See, e.g.*, SEPLER, *supra* note 12, at xiii fig.1. If there is no official complainant, an investigator will interview those people that she determines likely to have knowledge relevant to the investigation. She then prepares a report that outlines the process followed, summarizes the evidence obtained in the interviews and from any other sources, assesses the credibility of witnesses, and makes findings as to whether the allegations are substantiated based on the evidence. Depending on the mandate, the report will sometimes contain a legal conclusion regarding whether the respondent has breached an applicable policy or statute. It may also include recommendations as to how the organization ought to move forward based on the investigator’s findings of fact. *See, e.g.*, Margaret J. Grover

room for bias to seep into the investigation process, including during initial discussions with the client or witnesses about the case, pre-interview document review, interviews regarding the line of questioning and the phrasing of questions, when deciding which witnesses to interview and what additional evidence to review, and when deciding which evidence to reference and which to ignore in reports.

An effective investigation reaches accurate conclusions that those affected by the investigation will accept as fair.¹⁸ Courts have found that a fair investigation is one that is unbiased, as well as thorough and timely.¹⁹ A fair investigation is achieved, in part, through consistent use of a thoughtful, well-planned investigation process.²⁰ Elements of such a process may include establishment of a clear mandate, advising interviewees of the goal of conducting an objective investigation, careful review of documents, and communicating the result of the investigation to the parties.²¹

Even when employers implement safeguards to attempt to ensure a fair process, they may not be able to make any investigation entirely unbiased, as investigators inevitably bring their preconceived notions and unconscious biases with them.²² Workplace investigations can leave a great deal of room for biases, particularly unconscious ones, to steer the investigation towards predetermined conclusions. While most investigators believe that they make objective, impartial findings, the science concerning unconscious biases indicates that this may not be the case.²³

& Lauren S. Antonio, *Workplace Investigations – A Practical Approach*, 30 FALL BRIEF 8, 2000, at 9–10; Kastl & Kleiner, *supra* note 15.

¹⁸ See Kastl & Kleiner, *supra* note 15, at 227.

¹⁹ See MISSY DAVIDSON, THE IMPORTANCE OF INVESTIGATIONS IN THE DISCIPLINARY PROCESS 2–3 (Jan. 2011), http://www.npelra.org/files/public/CLRP/Davidson,Missy_CLRP_Paper_2011.pdf.

²⁰ See, e.g., SEPLER, *supra* note 12, at 49–59.

²¹ See generally Kastl & Kleiner, *supra* note 15 (discussing the elements of a workplace investigation).

²² *Id.* at 227–28.

²³ See generally OPPENHEIMER, *supra* note 6 (discussing the kinds of unconscious biases that can impact workplace investigators).

B. *Critical Role of Impartiality in Workplace Investigations*

“[N]eutrality serves ‘as the antidote against bias.’”²⁴

A critical aspect of a fair workplace investigation process is the investigator’s impartiality or lack of bias.²⁵ As with other dispute resolution processes, the integrity of the workplace investigation process rests upon the parties’ perception of the investigator as an “unaligned participant.”²⁶ The employer’s theories, biases, or preferences should not influence the workplace investigator in determining the appropriate conduct of an investigation or its outcome.²⁷

²⁴ Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U.J.L. & POL’Y 71, 76 (2010) (discussing mediation, another process in which neutrality plays a crucial role).

²⁵ See, for example, *Silva v. Lucky Stores*, 76 Cal. Rptr. 2d 382 (Cal. Ct. App. 1998) and *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995), two early cases that established benchmarks by which many investigations are still judged, including the need to remain objective. See also *Reeves v. Safeway Stores*, 16 Cal. Rptr. 3d 717, 736 (Cal. Ct. App. 2004) (holding that the investigation should be “truly independent” and that the employer in this case “predetermined” the terminated employee’s guilt without sufficient inquiry was evidence of retaliatory discharge); *Nazir v. United Airlines*, 100 Cal. Rptr. 3d 296, 325 (Cal. Ct. App. 2009) (stating, in a race discrimination case, that the use of an investigator with an “axe to grind” against the terminated employee could be evidence of pretext); EEOC ENFORCEMENT GUIDANCE, *supra* note 1 (“An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation.”); Mark J. Flynn, *Unlawful Retaliation and Workplace Investigations—Lines, Bars and “X” Factors*, COLO. LAW, Nov. 2013, at 85, 86 (“The integrity of an investigation is fundamental to its basic objective, getting to the truth of a matter in dispute.”).

²⁶ See GUIDING PRINCIPLES, *supra* note 4 (explaining that “the investigator should be someone the participants view as impartial, though this may not be possible in every case”). There are clear differences in the investigation and mediation processes, including that an investigator’s aim is to make findings of fact, possibly against the participant. See Flynn, *supra* note 26, at 86.

²⁷ See SEPLER, *supra* note 12, at 127–28.

An employee may face serious consequences as a result of an investigation. The results can have a devastating impact on an employee's reputation, day-to-day work life, and his or her livelihood. Arguably, the more detrimental the allegations, the more seriously an investigator must take the responsibility of conducting an impartial, unbiased investigation in order to come to fair and objective findings.

In addition to preserving the integrity of the process as a stand-alone goal, the legal and financial repercussions of a biased investigation can also be serious. Courts have not gone so far as to determine that an employer's duty to provide a thorough and reasonable investigation requires the same level of due process as in formal adjudicative processes.²⁸ Nonetheless, courts have increasingly required certain elements of procedural fairness in workplace investigations.²⁹ For instance, they have criticized investigations that do not adhere to basic due process principles, such as providing notice of the allegations to the respondent, granting an opportunity to be heard, and interviewing key witnesses.³⁰ Likewise, courts and other adjudicative bodies have

²⁸ See THOMILSON ET AL., *supra* note 16, at 7; see also *Cotran v. Rollins Hudig Hall Int'l Inc.*, 948 P.2d 412, 424 (Cal. 1998) (Mosk, J., concurring).

²⁹ See, e.g., *Tse v. Trow Consulting Eng'g Ltd.*, [1995] O.J. No. 2529 (Can. Ont. C.J.) (QL); *Nazir v. United Airlines*, 100 Cal. Rptr. 3d 296 (Cal. Ct. App. 2009); *Dewson v Boom Logistics Ltd.* [2012] FWA 9027 (Austl.); *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 526 P.2d 253, 263 (Cal. 1974); *Cotran*, 948 P.2d at 424. For an overview of due process rights in investigations set out in various labor arbitration decisions, see RICHARD L. KASPARI & KATHRYN M. ENGDahl, ANALYSIS OF INVESTIGATION, EVIDENCE, COMMUNICATION, AND IMPLEMENTATION (Nov. 8, 2007), <http://apps.americanbar.org/labor/annualconference/2007/materials/data/papers/v1/025.pdf>.

³⁰ See, e.g., *Tse*, [1995] O.J. No. 2529 (finding no just cause where an employee was summarily dismissed for sexual harassment without any particulars or explanation of the alleged harassment and stating that "[a]n obligation can be asserted to exist on the part of the employer to give the accused employee a chance to state his case"); *Quirola v. Xerox Canada Inc.* [1996] O.J. No. 21 (Can. Ont. Gen. Div.) (QL) ("The case is instructive for a rather comprehensive discussion of the importance of the need for a fair process with an opportunity for the employee to respond. It is to be noted in this case that although the defendant had elaborate policy guidelines in most areas, there was none with respect to sexual harassment."); *Foerderer v. Nova Scotia Chemicals*, [2007] A.J. No. 745 (Can.

frequently criticized workplace investigations for being conducted in a “biased” manner.³¹ Courts have found that fairness requires that there be neither actual bias nor a reasonable apprehension of bias.³² In articulating a test for reasonable apprehension of bias, one court asked whether “a reasonably informed bystander looking at the process [could] reasonably perceive bias on the part of one or more of the persons involved in the assessment of the complainant.”³³

While it is clear that investigator neutrality is critical to a fair process, it is not always clear what it means to be “unbiased.” Although often used interchangeably to describe the roles of

Alta. Q.B.) (upholding termination after investigation of sexual harassment allegations and rejecting the employee’s assertion of entitlement to due process and fair investigation). The *Foerderer* court cited with approval “Just Cause: The Law of Summary Dismissal in Canada” as follows:

It may be that while a duty to provide a fair hearing may not arise in the common law employment context the very nature of the allegations of sexual harassment, based for the most part on the accusations of one employee against another, compels the employer to exercise a degree of care in prosecuting the allegations, so as to balance the “rights” of the accused employee with those of the victim. While there are divergent views on this point, it does appear, that at the very least, by providing to the accused employee an opportunity to respond to allegations of harassment the employer enhances its case.

Foerderer, [2007] A.J. No. 745 (citing RANDALL SCOTT ECHLIN & MATTHEW L.O. CERTOSIMO, JUST CAUSE: THE LAW OF SUMMARY DISMISSAL IN CANADA (2010)).

³¹ See, e.g., *Francis v. Can. Imperial Bank of Commerce*, [1992] O.J. No. 153 (Can. Ont. Gen. Div.), rev’d, [1994] O.J. No. 2657 (Can. Ont. C.A.); Robert Finlay, *Investigating Employee Misconduct in the Workplace*, 57 *ADVOC. VANCOUVER* 881, 883 1999; *Elgert v. Home Hardware Stores Ltd.*, (2011) 510 A.R. 1 (Can. Alta. C.A.); *Downham v. Cty. of Lennox & Addington*, 2005 CanLII 45197 (Can. Ont. S.C.); *Ribeiro v. Can. Imperial Bank of Commerce*, 1989 CanLII 4281 (Can. Ont. S.C.); *Tong v. Home Depot of Can. Inc.*, 2004 CanLII 18228 (Can. Ont. S.C.); *Reeves v. Safeway Stores*, 16 Cal. Rptr. 3d 717 (Cal. Ct. App. 6th 2004); *Nazir v. United Airlines*, 100 Cal. Rptr. 3d 296 (Cal. Ct. App. 1st 2009); *Quela v. Payco-General Am. Credits, Inc.*, 84 F. Supp. 2d 956 (N.D. Ill. 2000).

³² *Haarsma v. the Deputy Minister of Nat’l Defence*, 2013 PSST 5, para. 28 (Can.).

³³ *Id.*

workplace investigators,³⁴ mediators, and judges, the terms “unbiased,” “neutral,” and “impartial” resist easy definition and, while they are similar concepts, they have subtly different meanings. Professional standards for mediators,³⁵ judges,³⁶ and arbitrators,³⁷ also require impartiality or neutrality in conducting their work and attempt to define these terms. Workplace investigators have no professional standards or model rules specific to their profession, though cases indicate that the meaning of “unbiased” in the context of workplace investigations includes the absence of having

³⁴ Many of the definitions of “unbiased,” “neutral,” and “impartial” include reference to one of the other terms. *See* Izumi, *supra* note 24, at 78 (discussing a study which “found that that fourteen out of fifteen mediators defined neutrality by using the word ‘impartiality’”).

³⁵ One definition of neutrality that various U.S. states use in respect to a mediator’s ethical obligation is, “*freedom from favoritism or bias either by word or action*, and a commitment to serve all parties as opposed to a single party.” *Id.* at 84; *see also* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. ARB. ASS’N 2005), https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_010409&revision=latestreleased (requiring mediators to “decline a mediation if the mediator cannot conduct it in an impartial manner,” defining impartiality as “freedom from favoritism, *bias*, or prejudice,” and finding that, “[a] mediator should not act with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason”).

³⁶ MODEL JUDICIAL CODE OF CONDUCT r. 2.3 cmt. (AM. BAR ASS’N 2011) (“A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.”). The Model Judicial Code of Conduct states that manifestations of bias or prejudice may include overt acts, such as “epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.” *Id.* The code also discusses subtle indicators of bias, noting that “facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice.” *Id.*

³⁷ The Code of Ethics for Arbitrators in Commercial Disputes, American Arbitration Association is also a potentially useful reference point in the development of standards for ethics for other neutrals, including investigators. *See* CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (AM. ARB. ASS’N 2004). Despite procedural differences between the processes, investigators and arbitrators face many of the same issues of neutrality, propriety, confidence, and fairness concerns well accounted for in the AAA Code.

commenced the investigation with a predetermined belief in the outcome.³⁸ Ultimately, these terms seem to mean that workplace investigators and other neutral professionals must be *free from bias*, meaning freedom from actual or perceived prejudice or partiality.³⁹

These definitions, while useful in providing an expectation that workplace investigators and other neutral professionals will conduct their work in a manner that is free from the influence of biases and prejudices, are incomplete. They do not address the existence of *unconscious* biases, which may impact the work of neutral professionals, including workplace investigators. Confronting the issue of unconscious bias would increase such professionals' awareness and understanding of the full range of possible biases that may affect their neutrality.

C. *The Unregulated Nature of Workplace Investigations*

The practice of workplace investigations remains largely unregulated.⁴⁰ Specific statutes and ethical rules govern individual investigators who belong to other professions (such as lawyers and private investigators), but no industry-wide standards, requisite training, or governing rules of professional conduct apply uniformly to workplace investigators. Case law does provide some guidance regarding broad principles that workplace investigators must follow.⁴¹ However, the cases are fact specific and do not provide the kind of guidance or consequences to professionals that regulation may create.

³⁸ See, e.g., *Tong v. Home Depot of Can. Inc.*, 2004 CanLII 18228, para. 11 (Can. Ont. S.C.) (explaining that an investigation will be tainted where it is determined that the in-house investigator commenced an investigation “with the firm belief that the [accused employee] was a wrongdoer”).

³⁹ See, e.g., *Izumi*, *supra* note 24, at 78–79; MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 35.

⁴⁰ Organizations such as the Association for Workplace Investigators, while voluntary, are very useful for providing training, information and awareness of issues specific to workplace investigators. See GUIDING PRINCIPLES, *supra* note 4.

⁴¹ See, e.g., *Elgert v. Home Hardware Stores Limited*, (2011) 510 A.R. 1, para. 86–89 (Can. Alta. C.A.).

Although highly regulated within their profession, lawyers acting as workplace investigators receive little guidance from their Model Rules of Professional Conduct regarding this unique role.⁴² Such ethical rules are relevant to a traditionally adversarial system, rather than the lawyer's role as a neutral.⁴³ In fact, many Rules of Professional Conduct only reference the role of a neutral in terms of lawyers' ethical duties when acting as arbitrators or mediators.⁴⁴ Such rules focus on the lawyer's duty to ensure parties understand the lawyer's role in the process—that he or she is not an advocate for either party.⁴⁵ Ethical issues that may face a third-party neutral beyond this are not considered.⁴⁶

Private investigators also act as workplace investigators. Most states require private investigators to be licensed. The New York General Business Law governs the licensing of such professionals and broadly defines the business of a “private investigator” to include being retained to investigate matters relating to employee conduct.⁴⁷ In other words, a licensed private investigator may

⁴² See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (2015).

⁴³ See Alison Smiley, *Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation*, 7 GEO. J. LEGAL ETHICS 213, 222 (1993) (noting several rules in conflict with the neutral lawyering concept, including “lawyer-client loyalty by enjoining lawyers from exercising independent judgment on their clients’ behalf,” and “mandate[ing] a lawyer’s zealous representation of his client”).

⁴⁴ See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT r. 2.4 (AM. BAR ASS’N 2013).

⁴⁵ See *id.* The ABA adopted Model Rule 2.4 in 2002, in response to the lack of guidance provided to lawyers who serve as neutrals. See Bruce E. Meyerson, *New Ethics Rules for Lawyers Who Serve as Mediators and Arbitrators*, 1999 PROF. LAW SYMP. ISSUES 113, 114 (“The proposed Model Rule begins by placing an ethical duty upon the lawyer who serves as a third-party neutral to conduct the proceedings in an impartial, unbiased way. The lawyer should withdraw if he is not able to conduct the proceedings impartially.”). Model Rule 2.4 requires a lawyer to disclose any reason the lawyer might not be perceived as impartial. *Id.* at 115.

⁴⁶ See Meyerson, *supra* note 45, at 114.

⁴⁷ N.Y. GEN. BUS. LAW § 71 (McKinney 2015) (“‘Private investigator’ shall mean and include the business of private investigator and shall also mean and include, separately or collectively, the making for hire, reward or for any consideration whatsoever, of any investigation, or investigations for the purpose of obtaining information with reference to any of the following matters,

conduct workplace investigations and will be regulated by that industry. This type of legislation does not generally apply to lawyers acting “in the regular practice of their profession.”⁴⁸ Some statutes do mandate that private investigators obtain training.⁴⁹ While some of that mandatory training includes references to education about bias in the decision-making and report-writing processes, there is no reference to the need for training on unconscious biases.⁵⁰

Thus, many workplace investigators may receive little to no training or continuing education specific to the issues they regularly face, including the challenge of controlling and reducing bias in the investigation process. Even those who do seek out such education may only be exposed to the more well known types of bias—actual or perceived, rather than unconscious.

II. THE SCIENCE OF UNCONSCIOUS BIAS

The science of unconscious bias, otherwise referred to as implicit bias or implicit cognition, studies an array of cognitive processes that unconsciously impact human decision-making processes and judgments.⁵¹ In the past decade or so, researchers have examined “the distinction between *explicit* and *implicit* mental

notwithstanding the fact that other functions and services may also be performed for fee, hire or reward,” including matters relating to “the conduct, honesty, efficiency, loyalty, or activities of employees, agents, contractors, and sub-contractors”); *see also* Private Security and Investigative Services Act, S.O. 2005, c. 34 (Can.) (defining “private investigator” broadly as “a person who performs work, for remuneration, that consists primarily of conducting investigations in order to provide information,” such as character or actions of a person, the business or occupation of a person, or the whereabouts of persons or property).

⁴⁸ *See, e.g.*, N.Y. GEN. BUS. LAW § 83 (McKinney 2015). This legislation would arguably apply to a licensed lawyer who is not engaged in the practice of law.

⁴⁹ In Ontario, private investigators must complete a Ministry approved Training Curriculum for Private Investigators and a licensing test. *See Private Security & Investigative Services*, ONT. MINISTRY OF COMMUNITY SAFETY & CORRECTIONAL SERVICES, http://www.mcscs.jus.gov.on.ca/english/PSIS/Training/AboutBasicTraining/PSI_S_training.html (last modified Mar. 24, 2016).

⁵⁰ *See id.*

⁵¹ *See* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 348 (2007).

processes in relation to racial and other forms of bias.”⁵² The research has demonstrated the existence of unconscious biases, which are mental processes that operate outside of humans’ consciousness, intentional awareness, or control, even in the face of introspection.⁵³ This science has also raised serious doubts about whether human *behavior* is under conscious control.⁵⁴

This science is important for professionals, like workplace investigators, for whom impartiality comprises a critical component of their work. The average person assumes that workplace investigators can “cognitively process, evaluate and weigh the facts presented” in a neutral manner, but research challenges the accuracy of this assumption and shows that cognitive biases affect the way all people process information.⁵⁵ For example, people often rely upon critical thinking errors and false stereotypes “to justify their initial, unreliable assessment.”⁵⁶ Courts have increasingly expressed concern about actual or perceived biases in workplace investigations.⁵⁷ In addition, courts and academics have recognized the impact *unconscious* biases have on mediators, juries, and judges, as well as on the effectiveness of laws.⁵⁸

While there are many kinds of unconscious biases, there are arguably two broad types that may have the most significant impact upon workplace investigators’ efforts at neutral fact-finding—

⁵² Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 917 (1999) (emphasis added).

⁵³ See Debra L. Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C.D. L. REV. 1563, 1564 & n. 3 (2013) (“The literature has used the synonyms ‘implicit,’ ‘automatic,’ and ‘unconscious’ in describing such bias.”); see also Hon. John F. Irwin & Daniel L. Reel, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 2, 3 (2011); Izumi, *supra* note 24, at 88; Greenwald & Krieger, *supra* note 6, at 946.

⁵⁴ Greenwald & Krieger, *supra* note 6, at 945.

⁵⁵ Levinson, *supra* note 51, at 347–48.

⁵⁶ Stephen Porter et al., *Dangerous Decisions: The Impact of First Impressions of Trustworthiness on the Evaluation of Legal Evidence and Defendant Culpability*, PSYCH., CRIME & L. 2010, at 1, 4.

⁵⁷ Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1028 (2008).

⁵⁸ *Id.* at 1026–29.

unconscious biases towards social groups and those biases that lead to “tunnel vision,” including confirmation bias, lie bias, and trustworthiness bias.

A. Unconscious Bias towards Social Groups

Much of the most well-known research on unconscious bias has focused on implicit attitudes towards members of socially stigmatized groups.⁵⁹ The research often refers to such biases as “implicit bias,” though the term is also used more broadly to encompass other kinds of unconscious biases.⁶⁰ Until the late 1980s, psychological research analyzed stereotyping and discriminating through “observable behavior and self-reports;” in other words, through *explicit* measures.⁶¹ “[M]ost psychologists believed that . . . attitudes, including stereotypes and prejudices, operated consciously . . . [and] that individuals were aware of their own biases and prejudices.”⁶² Beginning in the “1990s, psychologists documented that attitudes have both ‘explicit’ [(or conscious)] and ‘implicit’ [(or unconscious)] indices.”⁶³ Unconscious biases towards or against certain groups are based on social stereotypes or attitudes that have led to an association between a group and a trait.⁶⁴ They are “automatically triggered by the slightest interaction with a target group member.”⁶⁵ Research shows that implicit bias is widespread

⁵⁹ *Implicit Bias*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 26, 2015), <http://plato.stanford.edu/entries/implicit-bias/>.

⁶⁰ See *Understanding Implicit Bias*, KIRWAN INST., <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> (last visited Mar. 8, 2016).

⁶¹ Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 180 (2005).

⁶² Bassett, *supra* note 53, at 1567; see also Greenwald & Krieger, *supra* note 6, at 948 (noting that social psychologists define an attitude as an evaluative disposition, for example, the “tendency to like or dislike, or to act favorably or unfavorably toward someone or something”).

⁶³ See Bassett, *supra* note 53, at 1567–68.

⁶⁴ See Izumi, *supra* note 24, at 88; see also Greenwald & Krieger, *supra* note 6, at 949–51 (“Social stereotype is a mental association between a social group or category and a trait . . . the content of the ascribed trait, rather than its evaluative valence, is central For attitudes, the opposite holds.”).

⁶⁵ Pollard, *supra* note 52, at 920.

among the general public, and influences behavior in many contexts, including employment, medicine, law enforcement, and forensic science.⁶⁶

Implicit attitude measures⁶⁷ reveal a far greater bias in favor of advantaged groups than do explicit measures.⁶⁸ Manifestations of implicit bias often conflict with a person's explicit attitudes about a given group, a concept referred to as dissociation.⁶⁹ "Dissociation [is] commonly observed in attitudes toward[s] stigmatized groups."⁷⁰ Studies indicate that dissociation begins in middle childhood (age ten or so) "as participants' explicit bias began to dissipate."⁷¹

1. The Implicit Association Test and Other Research

Much of the evidence surrounding unconscious bias comes from the now well-known Implicit Association Test ("IAT") developed in the 1990s by Mahzarin Banaji and Anthony Greenwald.⁷² The

⁶⁶ Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 834 (2012).

⁶⁷ Greenwald and Banaji define "implicit attitudes" as "introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought or action toward social objects." Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 8 (1995). An example of an implicit attitude is where a voter votes for a candidate knowing nothing about him other than his name. Greenwald & Krieger, *supra* note 6, at 948. One thing influencing the voter is that he shares one or more initial letters with the candidate's name. *Id.* "In such a case, the vote can be understood, at least in part, as an implicit expression of the voter's self-favourable attitude." *Id.*

⁶⁸ See Izumi, *supra* note 24, at 93.

⁶⁹ Greenwald & Krieger, *supra* note 6, at 953; see Levinson, *supra* note 51, at 360; Patricia G. Devine, *Implicit Prejudice and Stereotyping: How Automatic Are They? Introduction to the Special Section*, 81 J. PERSONALITY & SOC. PSYCHOL. 757, 757 (2001).

⁷⁰ Greenwald & Krieger, *supra* note 6, at 949.

⁷¹ Izumi, *supra* note 24, at 94–95.

⁷² Irwin & Reel, *supra* note 53, at 3; see Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 971 (2006); Levinson, *supra* note 51, at 354–55. Note that there are other types of testing of unconscious bias, such as looking at physiological measures like "respiratory activity,

IAT has “provided powerful insight into and documentation of the prevalence of our collective unconscious prejudice.”⁷³ Results of the IAT have been repeatedly validated and consistently reflect that most people harbor unconscious biases in areas such as, race, gender, age, and disability.⁷⁴

The IAT is a computer-generated test that asks participants to categorize information as quickly as possible and then measures a participant’s reaction.⁷⁵ The IAT “pairs an attitude object (such as a racial group) with an evaluative dimension (i.e., good or bad) and tests how response accuracy and speed indicate implicit and automatic attitudes and stereotypes.”⁷⁶ The response time is significantly faster when associations are more easily made between the target group and the attribute than when associations are more difficult to determine.⁷⁷ One commentator explained this as follows:

It takes slightly longer (in terms of milliseconds) for an unconsciously biased individual to associate positive descriptive words with a member of a disfavored group than for the individual to associate positive descriptive words with other persons. This

electromyographical activity, and eyeblink startle reflex.” Page, *supra* note 61, at 184.

⁷³ Arterton, *supra* note 57, at 1031.

⁷⁴ See Basset, *supra* note 53, at 1567–70; see also Greenwald & Krieger, *supra* note 6, at 952. Some commentators have criticized the IAT, arguing that the data do not support the conclusion that implicit bias leads to discriminatory behaviour. See, e.g., Izumi, *supra* note 24, at 85.

A related and somewhat surprising finding was that members of bias-affected groups sometimes harbored implicit biases against their own group. For example, Banaji and Greenwald found that women and men both display implicit gender stereotypes that are sometimes negative toward women. Similarly, Brian Nosek and his colleagues reported that older people (those over sixty) and younger people (those in their twenties) show a similar implicit preference for young over old.

Levinson, *supra* note 51, at 361.

⁷⁵ Levinson, *supra* note 51, at 355–56.

⁷⁶ *Id.*

⁷⁷ Pollard, *supra* note 52, at 960.

discrepancy in time is due to the differences in cognitive barriers in making the connections.⁷⁸

This general method can be used to measure a wide variety of associations that underlie attitudes and stereotypes.⁷⁹

One of the more well known IATs is the black/white IAT, in which subjects respond more quickly when Caucasian-Americans are paired with pleasant words than when African-Americans are paired with pleasant words (such as “good”).⁸⁰ The results indicate an “implicit attitudinal preference for [European Americans] relative to [African Americans].”⁸¹ Other IAT iterations demonstrate unconscious biases against many different groups, including rampant implicit ageism.⁸²

The IAT and other research on implicit biases indicate that these biases are widespread and often contradict explicit beliefs.⁸³ Results of the IAT have shown that people’s implicit biases frequently diverge from their self-reported attitudes—the phenomenon of “dissociation” referred to above.⁸⁴ Many people sincerely express a

⁷⁸ *Id.* at 918; *see also* Irwin & Reel, *supra* note 53, at 3. Note that some authors have seriously criticized implicit bias research for failing to “satisfy key scientific tests of validity” and have cautioned against making sweeping statements that the science compels one or another proposed legal reform. *See* Samuel Bagenstos, *Implicit Bias, “Science” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 479 (2007) (quoting Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1023 (2006)). There is substantial dispute within psychology on some of these critiques. *See, e.g.*, Greenwald & Krieger, *supra* note 6, at 946.

⁷⁹ Greenwald & Krieger, *supra* note 6, at 952.

⁸⁰ *See* Roberts, *supra* note 66, at 848; *see also* Pollard, *supra* note 52, at 961.

⁸¹ Greenwald & Krieger, *supra* note 6, at 953.

⁸² Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, in AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 49, 51–52 (Todd D. Nelson ed., 2002); *see also* Izumi, *supra* note 24, at 94 (noting that implicit ageism has been shown to be far more negative than explicit attitudes and to crosscut all age groups).

⁸³ Pollard, *supra* note 52, at 917–18; Jolls & Sunstein, *supra* note 72, at 971. “The impact of this type of bias on minorities can be as insidious as the older traditional form of discrimination.” Pollard, *supra* note 52, at 927. For a discussion as to why implicit biases are so prevalent, *see* Greenwald & Krieger, *supra* note 6, at 959–60.

⁸⁴ *See* Levy & Banaji, *supra* note 82, at 52.

commitment “to an anti-discrimination principle with respect to the very trait against which they show a bias.”⁸⁵

Further, implicit biases predict behavior and the way people make important decisions, often producing spontaneous behavior that “diverges from a person’s avowed or endorsed beliefs or principles.”⁸⁶ Implicit bias measures predict behaviour better than explicit measures in situations that are “socially sensitive . . . where impression-management processes might inhibit people from expressing negative attitudes or unattractive stereotypes.”⁸⁷ Their predictive validity is also higher with respect to “spontaneous behaviors such as eye contact, seating distance, and [similar] . . . actions that communicate social warmth or discomfort.”⁸⁸

Many additional studies have been conducted that demonstrate that unconscious biases can be used to predict behavior in a variety of circumstances, including racial interactions,⁸⁹ physician

⁸⁵ Jolls & Sunstein, *supra* note 72, at 975.

⁸⁶ Greenwald & Krieger, *supra* note 6, at 951, 961.

⁸⁷ *Id.* at 954–55.

⁸⁸ *Id.* at 955; *see also* Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antipathy Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCHOL. 268, 268 (2006).

⁸⁹ *See* Greenwald & Krieger, *supra* note 6, at 961–62. One of the first experiments to relate an IAT race attitude measure to discriminatory behavior involved videotaping behavior of white undergraduates while being interviewed separately by white and black experimenters. *Id.* at 961. The participants “also completed a race attitude IAT measure.” *Id.* Those whose “IAT scores indicated strong implicit preference for [w]hite relative to [b]lack . . . [showed] subtle and spontaneous behaviors [that] suggested higher levels of comfort interacting with . . . [w]hite experimenters,” including less hesitation, fewer speech errors, and smiling more. *Id.*

recommendations regarding health care,⁹⁰ hiring of minority⁹¹ and female candidates,⁹² and judicial decision-making.⁹³

2. Explanations for Unconscious Biases About Groups

Unconscious biases are “rooted in the fundamental mechanics of the human thought process.”⁹⁴ Scientists have found that human minds naturally stereotype as part of a “categorization” process, useful in simplifying our complex environment for more efficient cognitive functioning.⁹⁵ Categorization has been described as “the most basic and essential of all cognitive processes”—without it, humans would be “engulfed in a tidal wave of details” and their “minds unable to cope.”⁹⁶ Humans form schemas in which they group similar objects, events, ideas, and people, expecting these associated items to coexist in different settings.⁹⁷ People or things that do not fit easily in a specific category “may be forced into a category regardless, thus reducing complexity, but introducing inaccuracy.”⁹⁸

⁹⁰ Izumi, *supra* note 24, at 95 (citing a study in which doctors with higher measures of white preference recommended better treatment options to white patients with the same medical profiles of black patients); *see also* Roberts, *supra* note 66, at 850 (citing a study in which doctors and nurses were found to have tested positive on the IAT for white preference).

⁹¹ *See* JUSTIN D. LEVINSON ET AL., *IMPLICIT RACIAL BIAS ACROSS THE LAW* 20 (Justin D. Levinson & Robert J. Smith eds., 2012) (discussing a study showing that employers who harbored implicit biases towards Arabs were less likely to call Arab candidates for job interviews).

⁹² *See* Greenwald & Krieger, *supra* note 6, at 949–51 for a discussion on implicit stereotypes utilized in societal situations between males and females.

⁹³ *See* Irwin & Reel, *supra* note 53, at 5; Izumi, *supra* note 24, at 98 (explaining how studies have shown that implicit biases can affect judges’ decision-making and may explain, at least in part, disparities in judicial decision-making, such as in relation to convictions and sentencing).

⁹⁴ Irwin & Reel, *supra* note 53, at 3.

⁹⁵ Pollard, *supra* note 52, at 947; *see* Page, *supra* note 61, at 181 (“[The] basic way in which people try to understand their world – categorization – can, of its own accord, lead to stereotyping and discrimination.”).

⁹⁶ Page, *supra* note 61, at 186.

⁹⁷ *See id.* at 189–90.

⁹⁸ *Id.* at 186.

While stereotypes have the benefit of permitting a “decision-maker to make rapid inferences and reduce cognitive effort”⁹⁹ they also lead to oversimplified conceptions and misapplied knowledge.¹⁰⁰ “As a result, stereotyping ‘per se, propels the individual down the road to bias.’”¹⁰¹ These stereotypes are “‘categories that have gone too far,’ using personal characteristics such as race or gender as a proxy for personality traits such as hostility, intelligence, or weakness.”¹⁰²

“[P]sychologists have found that stereotypes arise when a person is as young as three years old and are usually learned from parents, peers, and the media.”¹⁰³ As people grow older, their stereotypes “harden” and, while they may develop nonbiased (or explicit) views of the world, their stereotypes “become implicit and remain mostly unchanged even as they develop nonprejudiced explicit views.”¹⁰⁴ The original beliefs “remain in the unconscious, waiting to be activated”¹⁰⁵ and are easily and “automatically triggered by the slightest interaction with a target group member.”¹⁰⁶

Once developed, stereotypes are not easily changed. They are “self-perpetuating” and maintained even in the face of disconfirming data.¹⁰⁷ As they help us “fill in missing information” in our environment, “data supporting the stereotype is encoded while data not supporting the stereotype is discarded.”¹⁰⁸ It is also

⁹⁹ *Id.* at 236.

¹⁰⁰ *Id.* at 188. For an overview of various theories and models provided by psychologists to explain why humans form and utilize stereotypes, see Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 *UCLA L. REV.* 1241, 1254–66 (2001).

¹⁰¹ Page, *supra* note 61, at 188.

¹⁰² Pollard, *supra* note 52, at 919–20 (quoting Annie Murphy Paul, *Where Bias Begins: The Truth About Stereotypes*, *PSYCHOL. TODAY*, May–June 1998, at 52, 53).

¹⁰³ Levinson, *supra* note 51, at 363.

¹⁰⁴ *Id.*

¹⁰⁵ Page, *supra* note 61, at 204.

¹⁰⁶ Pollard, *supra* note 52, at 920; see Izumi, *supra* note 24, at 92.

¹⁰⁷ Pollard, *supra* note 52, at 947. For a thorough review of the cognitive processes by which people form and maintain stereotypes, see Page, *supra* note 61, at 199–202.

¹⁰⁸ Pollard, *supra* note 52, at 947.

difficult to “forget” stereotypes.¹⁰⁹ To do so requires “tremendous mental resources” and may, in fact, “lead to a ‘rebound effect’ in which the stereotype one tries to avoid is promoted.”¹¹⁰ This is because stereotypes are frequently and easily recalled, which reinforces them in people’s minds.¹¹¹

Stereotypes also come from other psychological phenomena. They relate to the “human instinct to identify with a group or clan.”¹¹² Further, “the motivation to boost self-worth also affects the activation and application of negative group stereotypes.”¹¹³ Stereotypes are also often justified and propagated by way of self-fulfilling prophecy. One commentator described this process:

[W]e use schemas to anticipate what a stereotyped group member will be like, how he or she will react, and how we should behave. Our anticipatory behavior toward the group member influences how the group member responds; in essence, the anticipatory behavior by the person operating under the stereotype influences and causes the target group member to engage in the “expected” behavior, thus confirming the stereotype regardless of the stereotype’s accuracy.¹¹⁴

Unconscious biases towards groups of people can have particularly negative impacts on neutrality in workplace investigations. Such biases may impact an investigator’s views of the parties or witnesses to an investigation, despite explicitly held views, and thus taint how they conduct their investigations, analyze evidence, and assess credibility.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 948.

¹¹¹ *Id.*

¹¹² *Id.* at 917.

¹¹³ Blasi, *supra* note 100, at 1252. In cases where activating or applying a negative stereotype would tend to diminish our self-concept we are less likely to do so (e.g., praising a female teacher who gave us good marks). *Id.* at 1251.

¹¹⁴ Pollard, *supra* note 52, at 956.

B. Tunnel Vision: Confirmation Bias and Other Cognitive Biases

“It is the peculiar and perpetual error of the human understanding to be more moved and excited by affirmatives than negatives, whereas it ought duly to be impartial; nay, in establishing any true axiom, the negative instance is the most powerful.”¹¹⁵

In addition to unconscious biases about social groups, other cognitive biases can impact how people make decisions. Collectively, some of these cognitive biases can work together to contribute to what some refer to as “tunnel vision.”¹¹⁶ One commentator defined tunnel vision as “that ‘compendium of common heuristics and logical fallacies,’ to which we are all susceptible.” Tunnel vision leads actors to focus on a particular conclusion and then to filter all evidence in a case through the lens of that conclusion—significantly elevating supporting evidence and overlooking or dismissing inconsistent evidence.¹¹⁷ This is generally not the result of “maliciousness or indifference” but rather “the product of the human condition as well as institutional and cultural pressures.”¹¹⁸ People regularly rely upon a variety of cognitive biases and “heuristics” (or mental shortcuts) to make complex decisions, leading people to make decisions in “predictably irrational ways.”¹¹⁹ This section discusses some of the unconscious biases that can lead to tunnel vision, including confirmation bias, lie bias, and trustworthiness bias.

¹¹⁵ FRANCIS BACON, WORKS 348 (Basil Montagu ed., 3d vol., Philadelphia, Carey & Hart 1841).

¹¹⁶ Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–08 (2006).

¹¹⁷ *Id.* at 292.

¹¹⁸ *Id.*

¹¹⁹ Edie Greene & Brian H. Bornstein, *Book Review: Nudging the Justice System Toward Better Decisions*, 103 J. CRIM. L. & CRIMINOLOGY 1155, 1161–62 (2013).

1. Confirmation Bias

“Confirmation bias is the tendency to [unconsciously] bolster a hypothesis,” belief, or expectation by seeking and/or favoring confirming information while minimizing or ignoring disconfirming information.¹²⁰ Once people form a hypothesis, “they search for information to support it, interpret ambiguous information as consistent with it, and minimize inconsistent evidence.”¹²¹ Even in situations where there is no prior relevant reason to confirm a hypothesis, “people [nonetheless] tend to favo[r] confirmation as the default testing strategy.”¹²² The empirical research has produced overwhelming data to support the existence of confirmation bias across diverse judgment contexts, such as economics, criminal investigations, medical decision-making, political beliefs, logical problem solving, forensic analysis, and social interaction.¹²³ The

¹²⁰ Barbara O’Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL., PUB. POL’Y & L. 315, 315 (2009); see also Findley & Scott, *supra* note 116, at 309 (“[T]he tendency to seek or interpret evidence in ways that support existing beliefs, expectations, or hypotheses.”); Martine B. Powell et al., *Skills in Interviewing Reduces Confirmation Bias*, 9 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 126, 126 (2012); Eric Rassin, *Blindness to Alternative Scenarios in Evidence Evaluation*, 7 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 153, 154 (2010).

¹²¹ O’Brien, *supra* note 120, at 328; see also Karl Ask et al., *The ‘Elasticity’ of Criminal Evidence: A Moderator of Investigation Bias*, 22 APPLIED COGNITIVE PSYCHOL. 1245, 1246 (2008); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 516–17 (2007).

¹²² Eric Rassin et al., *Let’s Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations*, J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 231, 232 (2010).

¹²³ Ask et al., *supra* note 121, at 1246; see Rassin et al., *supra* note 122, at 231; Galit Nahari & Gershon Ben-Shakhar, *Primacy Effect in Credibility Judgments: The Vulnerability of Verbal Cues to Biased Interpretations*, 27 APPLIED COGNITIVE PSYCHOL. 247, 247 (2013). The recent report produced by Columbia University School of Journalism evaluating what went wrong with the Rolling Stone article entitled “A Rape on Campus” cited confirmation bias as having played a role in the journalistic failures of that article:

The problem of confirmation bias – the tendency of people to be trapped by pre-existing assumptions and to select facts that support their own views while overlooking contradictory ones – is a well-established finding of social science. It seems to have

danger of confirmation bias for any professional who is required to maintain neutrality is that they run the risk of becoming convinced that a suspect or respondent is guilty or has behaved in a certain manner, and may then no longer be open to alternative scenarios. This may equally disadvantage a complainant where an investigator is convinced that the respondent is *not* guilty. This is not through “deliberate case building,” but, unconscious information processing.¹²⁴ It involves “unwittingly selecting and interpreting evidence to support a previously held belief.”¹²⁵ Simply forming a hypothesis worsens bias.¹²⁶

Studies of confirmation bias have shown that most people “sho[w] a preference for evidence that . . . confirms their hypothesis over evidence that would disconfirm it, even [where] the latter [is] more probative.”¹²⁷ Confirmation bias may also result when a person obtains a description of another’s qualities before meeting them.¹²⁸ Studies further show that in some circumstances, people do not respond to information at variance with their beliefs by merely ignoring it, but rather by critically examining it *so as to undermine it*. “The end product of this intense scrutiny is that the contradictory

been a factor here. Erdely believed the university was obstructing justice. She felt she had been blocked. Like many other universities, UVA had a flawed record of managing sexual assault cases. Jackie’s experience seemed to confirm this larger pattern. Her story seemed well established on campus, repeated and accepted.

Sheila Coronel, et al., *Rolling Stone and UVA: A Columbia University Graduate School of Journalism Report*, ROLLING STONE (Apr. 5, 2015), <http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405?page=3>.

¹²⁴ O’Brien, *supra* note 120, at 316.

¹²⁵ *Id.*; see also Page, *supra* note 61, at 215–16 (“Once a decision-maker has a tentative hypothesis about a person, she must process information in order to support or reject the hypothesis. Keeping in mind that our senses receive more than eleven million pieces of information every second, and that the highest number of pieces we can consciously process is roughly forty, much of our information processing can and must occur unconsciously. Our brain filters what we will consciously address, like hearing our name across the room at a cocktail party.”).

¹²⁶ See O’Brien, *supra* note 120, at 328.

¹²⁷ Findley & Scott, *supra* note 116, at 310.

¹²⁸ See *id.* at 311.

information is either considered too flawed to be relevant, or is redefined into a less damaging category.”¹²⁹

Another phenomenon related to confirmation bias, expectancy effects, occurs when a prediction or prophecy is made that causes people to alter their behaviors such that “a statement that would have been false becomes true as a consequence of the prediction or prophecy being made.”¹³⁰ Experiments have been conducted in which investigative interviewers are given pre-interview reasons to believe or to doubt the interviewee.¹³¹ This “assignment of expectation” impacted the investigators’ interviewing behavior, including how they structured the interview and the questions they posed.¹³² Expectation also lays the groundwork for selective attention to evidence. Humans are often confronted with far too much information to process and will tend to draw selectively from the available information, focusing on items that confirm an expectation about a given event.¹³³

Many studies conducted on confirmation bias in the context of criminal investigations have led researchers to conclude that an “investigator bias” exists.¹³⁴ Investigator bias leads investigators to “select and filter the evidence that will build a case for conviction, while ignoring or suppressing evidence that points away from guilt.”¹³⁵ The early naming of a suspect itself increases confirmation

¹²⁹ *Id.* at 313.

¹³⁰ Victoria Springer, *Expectancy Effects in Forensic Evidence Handling: Social Psychological Perspectives*, 7 *JJIS* 311, 311 (2007). Demonstrating the expectancy effect, “a pathologist who is told she is being presented with a slide of abnormal cells is more likely to conclude that she is seeing abnormal cells than one who is told she is being presented with a slide of normal cells.” See D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 *CAL. L. REV.* 1, 13 (2002).

¹³¹ Risinger, *supra* note 130, at 15.

¹³² *Id.*

¹³³ *Id.* An example of this “expectancy effect” is found in one study that showed examination scorers gave different grades to identical performances and that those differences correlated with the exam graders’ expectations created by the child’s IQ score. *Id.* at 23.

¹³⁴ See Findley & Scott, *supra* note 116, at 295.

¹³⁵ *Id.* at 292.

bias throughout criminal investigations.¹³⁶ Further, criminal investigators tend to be more skeptical about evidence that counters their original perception than evidence that is consistent with it.¹³⁷ Even temporary acceptance of the truth of a hypothesis may have consequences for the entirety of the investigation, including how an investigator “perceives the problem, interprets relevant data, and searches for new information.”¹³⁸

This shift towards proving guilt in investigations may not always impact the outcome. However, when the evidence is ambiguous, subtle influences on how an investigator interprets that evidence could influence the outcome.¹³⁹ As one commentator stated, “[a] weak case can start to look strong when the investigator overlooks potentially fruitful leads in another direction.”¹⁴⁰ Investigators may

¹³⁶ See O’Brien, *supra* note 120, at 324, 328 (describing a study in which participants stated early on who they believed committed the crime, compared to participants not asked to name a suspect, remembered the facts as more consistent with the named suspect’s guilt, “advocated more lines of investigation focused on him, required more reports focused on him, and subtly shifted their opinions about matters relevant to determining guilt in a way that support[ed] their suspicions”). In one study, participants prepped with information that a videotaped alibi provider was guilty recalled less alibi-relevant information, found the alibi less believable, and viewed the alibi provider more negatively than did participants without such an expectation. See Elizabeth Olson, “*You Don’t Expect Me to Believe That, Do You?*” *Expectations Influence Recall and Belief of Alibi Information*, 43 J. APPLIED SOC. PSYCHOL. 1238, 1238 (2013). In another similar study, those primed with guilty expectations “pushed hard for confessions, selected more guilt-presumptive questions, and interpreted suspects’ behaviour as more consistent with guilt.” See Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 L. & HUM. BEHAV. 183, 187 (2003). Indeed, they exerted the most pressure on *innocent* suspects who offered plausible denials, in an apparent redoubling effort to elicit a confession. See *id.*

¹³⁷ Karl Ask & Par Anders Granhag, *Motivational Bias in Criminal Investigators’ Judgments of Witness Reliability*, 31 J. APPLIED SOC. PSYCHOL. 561, 565 (2007); see O’Brien, *supra* note 120, at 318.

¹³⁸ O’Brien, *supra* note 120, at 317.

¹³⁹ See Risinger, *supra* note 130, at 16.

¹⁴⁰ See O’Brien, *supra* note 120, 328–29 (“Investigators need not be especially sure that they have the right person to sway their investigation toward an early suspect.”).

then become convinced of guilt based on the evidence, leaving them less open to alternative scenarios.¹⁴¹

Workplace investigators are highly susceptible to confirmation bias and expectancy effects, as they, like criminal investigators, question interviewees, assess credibility, and interpret evidence. Since workplace investigators are given a “suspect” or respondent at the very start of the investigation, workplace investigators may form a programmed hypothesis from which they may not escape. This can affect not only how they interpret existing evidence, but also what evidence they look for next, all of which can profoundly undermine the truth-finding process.¹⁴²

2. Lie Bias

“Lie bias” or “deception bias” is a bias towards believing a person to be deceptive rather than truthful.¹⁴³ This bias impacts many investigators and fact-finders¹⁴⁴ as they rely upon body language to “detect inconsistencies, contradictions, and other signs of deception.”¹⁴⁵ Further, “trained detectives and interrogators tend to be more confident in their judgments than untrained individuals.”¹⁴⁶

The Reid Approach is an interrogation technique in which many police investigators are trained.¹⁴⁷ It advocates a two-step process: a nonconfrontational, fact-finding interview to determine if suspect is lying or telling the truth; then if the suspect is deemed guilty, a shift

¹⁴¹ See Rassin et al, *supra* note 122, at 240; see also O’Brien, *supra* note 120, at 315.

¹⁴² See O’Brien, *supra* note 120, at 316.

¹⁴³ See generally Findley & Scott, *supra* note 116, at 337 (explaining that detectives with deception bias tend to presume guilt); see also Christian A. Meissner & Saul M. Kassin, “He’s Guilty!”: Investigator Bias in Judgments of Truth and Deception, 26 L. & HUM. BEHAV. 469, 478 (2002) (describing how there is an “investigator bias effect” where confident investigators are more likely to respond that a suspect was being “deceitful” rather than “truthful”).

¹⁴⁴ See Findley & Scott, *supra* note 116, at 337.

¹⁴⁵ Louis Avitabile & Brian H. Kleiner, *How to Assess Credibility When Conducting Workplace Investigations*, 26 MGMT. RES. NEWS, 219, 222 (2003).

¹⁴⁶ Findley & Scott, *supra* note 116, at 337; see Meissner & Kassin, *supra* note 143, at 478.

¹⁴⁷ Olson, *supra* note 136, at 1238.

is made to interrogation, which is a guilt-presumptive interaction.¹⁴⁸ The Reid Technique has been strongly criticized for leading investigators to take guilty expectations into the interview stage, causing them to “interpret, encode, and recall only information that fits their expectation—information that indicates a suspect is guilty or lying.”¹⁴⁹

Further, the Reid Technique has been criticized for its claim that those trained in its techniques of observing and analyzing verbal and nonverbal behavior¹⁵⁰ can judge truth and deception with high levels of accuracy.¹⁵¹ Studies indicate that “training and prior experience increased the likelihood of judging a story as a lie,”¹⁵² though research has shown that those trained to detect lies are only very slightly more able to do so than lay people.¹⁵³ Indeed, one study indicated that students trained in the Reid Technique did significantly worse in distinguishing between innocent true denials and guilty false denials, though they were more confident in their judgments and articulated more reasons for their judgments.¹⁵⁴ The same study was replicated with detectives and investigators, the majority of whom had special training. The overall level of accuracy even amongst these professionals was only 56 percent.¹⁵⁵

¹⁴⁸ *Id.* Once interrogation starts, a nine-step interrogation process is used. Findley & Scott, *supra* note 116, 334. It is “designed to break suspects down, convince them that they are doomed, and then make a confession appear to be a rational or risk-reducing choice.” *Id.*

¹⁴⁹ Olson, *supra* note 136, at 1238.

¹⁵⁰ Saul M. Kassir, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 812 (2002). Signs of deception include “avoidance of eye contact[,] . . . slouching, maintaining a rigid posture, crossing arms or legs, and issuing qualified denials.” *Id.*

¹⁵¹ *Id.* (“John A. Reid & Associates claim they can train detectives to judge truth and deception at 80 to 85 percent levels of accuracy.”).

¹⁵² Olson, *supra* note 136, at 1238–39.

¹⁵³ See Jaume Masip et al., *Training to Detect What? The Biasing Effects of Training on Veracity Judgments*, 23 APPLIED COGNITIVE PSYCHOL. 1282, 1282 (2009).

¹⁵⁴ See Kassir, *supra* note 150, at 813–14.

¹⁵⁵ *Id.* at 811, 814; see also Meissner & Kassir, *supra* note 143, at 470. Several studies show that “professional lie detectors” (or those who detect deception for a living) are not better at accurately detecting deception than lay observers. Masip et al., *supra* note 153, at 1282. One study asked college students

Workplace investigators are susceptible to lie bias and that susceptibility may be heightened for those who are trained in and utilize the Reid Technique. As part of their work, workplace investigators must regularly assess credibility of the parties and witnesses to reach their conclusions. While a certain level of skepticism may serve an investigator well in this regard, there is real risk that he or she will be led astray by expectations or assumptions about a person's deceptiveness based on little more than initial impressions. Lie bias, in turn, may lead to or increase confirmation bias, as the investigator seeks additional evidence to confirm a belief that the respondent is lying.

3. "Trustworthiness Bias" or Dangerous Decisions Theory

The Dangerous Decisions Theory ("DDT") "suggests that instantaneous impressions of trustworthiness based on facial appearance may play a major role in both assessing the credibility of and ensuing decisions about the target."¹⁵⁶ DDT suggests that people make "potent judgments of trustworthiness" rapidly upon seeing a defendant's face.¹⁵⁷ Yet research shows that such assessments based on the face alone "while instantaneous, are highly fallible."¹⁵⁸

Much like the effect of an early hypothesis on confirmation bias, an initial evaluation of a witness' trustworthiness is "thought to

and trained professionals to determine whether videotaped stories were true and or false. Kassir, *supra* note 150, at 811. The accuracy rates for college students were 52.8%, compared to a range of 55.8% to 57.6% for trained professionals such as police detectives, CIA, FBI, military polygraph examiners, and trial judges. *Id.* US Secret Service Agents performed the best at 64%. *Id.* Focusing on nonverbal cues also leads to a stronger lie bias. See Aldert Vrij, *Nonverbal Dominance Versus Verbal Accuracy in Lie Detection*, 35 CRIM. JUST. & BEHAV. 1323, 1323 (2008). For a defense of the Reid Technique, see Jonathan Goodman, *Getting to the Truth: Analysis and Argument in Support of the Reid Technique of Interview and Interrogation*, 21 MAINE B. J. 20 (2006).

¹⁵⁶ Porter et al., *supra* note 56, at 2.

¹⁵⁷ Stephen Porter & Leanne ten Brinke, *Dangerous Decisions: A Theoretical Framework for Understanding How Judges Assess Credibility in the Courtroom*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. J. 119, 119 (2009).

¹⁵⁸ Porter et al., *supra* note 56, at 3.

influence subsequent inferences concerning the defendant (or other witnesses) by making decision-making about him/her increasingly irrational, leading to biased decisions.”¹⁵⁹ DDT, like confirmation bias, is concerning in its potential to “result in a non-critical, ‘tunnel vision’ assimilation of potentially ambiguous and even contradictory evidence concerning the defendant.”¹⁶⁰

One study conducted on this phenomenon showed that less evidence was required to convict an “untrustworthy looking” defendant of the same crime as a “trustworthy looking” person, particularly for a more severe crime.¹⁶¹ Further, the “untrustworthy defendants’ were [deemed] guilty based on an average of fewer than five pieces of ‘ambiguous’ evidence, while more incriminating evidence was necessary to convict a trustworthy defendant of the same . . . crime.”¹⁶²

While the studies on DDT relate primarily to the context of the courtroom, DDT may equally impact workplace investigators. External workplace investigators (as opposed to in-house investigators) may be particularly susceptible to this, as they generally have no prior contact with or knowledge of the respondent (or other witnesses) and may be more likely to make biased decisions about him or her based upon appearances. That initial judgment of trustworthiness can be critical in an investigation, as it may lead a workplace investigator astray as he or she seeks evidence that confirms that initial impression.

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.* at 4.

¹⁶¹ *Id.* at 7–8.

¹⁶² *Id.* at 10. An example of the dangerous decisions theory at work occurred in a Florida case. Tom Sawyer was accused of sexual assault and murder, interrogated for 16 hours, and a confession was extracted, likely to have been false. Meissner & Kasson, *supra* note 143, at 470. Charges were ultimately dropped, as the trial judge suppressed the confession. *Id.* at 470–71.

Most intriguing to us was the manner in which Sawyer became a prime suspect—his face flushed and he appeared embarrassed during an initial interview, a behavioral reaction interpreted as a sign of deception. However, what the investigators did not know was that Sawyer was a recovering alcoholic with a social anxiety disorder that caused him to sweat profusely and blush in evaluative social situations.

Id. at 471.

C. Potential Impact of Unconscious Biases on Workplace Investigators

The potential impact of the unconscious biases discussed above on the true neutrality of workplace investigators is significant.¹⁶³ Workplace investigators, like all people, are susceptible to these automatic cognitive biases in accessing and interpreting data.¹⁶⁴ Even if workplace investigators hold explicit egalitarian values, are free from bias or prejudice against either party, and know all the relevant facts, they may still make “systematically erroneous decisions” or have “cognitive accidents,” not because of ill intentions, but simply as a result of automatic human thought processes.¹⁶⁵

Workplace investigators often deal with ambiguous situations where evidence can be interpreted and credibility assessed in different ways. This is important because studies indicate that discrimination is more likely to occur in normatively ambiguous situations, even for those holding explicit egalitarian values, as opposed to those involving “clear indications of right and wrong behavior.”¹⁶⁶ This is due to the automatic nature of stereotypes and a lack of awareness about the need to monitor our biases.¹⁶⁷

¹⁶³ *See id.*

¹⁶⁴ *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 829 (2001). The problem of tunnel vision is well-recognized in the criminal justice system. Several official inquiries have concluded that tunnel vision has played a significant role in specific wrongful convictions. *See* Findley & Scott, *supra* note 116, at 294.

¹⁶⁵ Guthrie et al., *supra* note 164, at 829; *see also* Burke, *supra* note 121, at 528 (discussing the “narrative trend that increasingly depicts prosecutors as victims of cognitive accidents as opposed to purposeful or reckless wrongdoers”).

¹⁶⁶ *See generally* Guthrie et al., *supra* note 164, at 829 (explaining that even judges who are free from bias and prejudice make erroneous decisions because of the way they think).

¹⁶⁷ *See id.* at 829–30. Interestingly, one experiment demonstrated that “[w]hite jurors are more likely to demonstrate racial prejudice in cases *without* salient racial issues.” Blasi, *supra* note 100, at 1247 (emphasis added). The experiment involved providing jurors with two similar scenarios, one of which contained an additional sentence “suggest[ing] that the defendant had been the subject of racial remarks and unfair criticism from teammates of the other racial group earlier in the season.” *Id.* The mock jurors in the “race-salient version . . . were as likely to convict the White as the Black defendant on the same

Cognitive biases may also overlap and exacerbate faulty decision-making and judgments about evidence and witnesses. For example, an unconscious bias about a racial group may cause the investigator to develop an initial hypothesis based on a stereotype and seek to confirm it. Preliminary hypotheses may bias the subsequent evidence collection process and analysis, which can detrimentally impact the lives of those involved in workplace investigations. Confirmation bias is “exacerbated in situations where people must make sense of information sequentially, adding new information to an existing framework,” precisely what occurs in a workplace investigation.¹⁶⁸

Ultimately, workplace investigators must understand how cognitive biases can automatically and unintentionally lead to poorly supported findings and possible damage to the subject of the investigation. Court decisions analyzing biased investigations help to illustrate how bias may undermine the investigation process and results.

III. CASES OF BIASED INVESTIGATIONS

In recent years, there has been increased judicial scrutiny of employers’ workplace investigation processes. Courts expect investigations to be conducted in a fair manner. “[J]udges seem to be recognizing the power imbalance inherent in the employer-employee relationships and attempting to tip the scales back to a (perceived) equilibrium.”¹⁶⁹ Neutrality, or lack of bias, on the part of the investigator is one of the core components that judges consider in evaluating the fairness of an investigation.¹⁷⁰

While courts do not appear to have specifically referred to unconscious bias to explain or criticize a workplace investigation result, the cases addressed in this section provide examples of cases in which confirmation bias seems to have played a significant role. Many of the investigators in these cases sought evidence confirming

facts.” *Id.* In the scenario without the sentence, “mock jurors convicted the Black defendant 90 percent of the time and White defendant only 70 percent of the time.” *Id.*

¹⁶⁸ See Olson, *supra* note 136, at 1239.

¹⁶⁹ Finlay, *supra* note 31, at 882.

¹⁷⁰ See Avitabile & Kleiner, *supra* note 145, at 220.

their initial beliefs at the expense of a thorough and fair investigation.

It is not clear whether the bias at play in all of the cases cited below was entirely “unconscious,” as at least some of the facts tend to indicate some level of intentionality. Also, the cases do not provide obvious examples of the arguably more difficult types of cognitive biases to identify based on evidence about the investigative process, such as biases towards groups or DDT. Even so, these cases demonstrate the damage that bias in any form can do to the integrity of a workplace investigation and ought to serve as a cautionary tale to all investigators, who are all susceptible to conducting similarly unfair investigations as a result of unconscious biases.

A. Investigations in Which Confirmation Bias May Have Played a Role

Several recent Canadian cases demonstrate confirmation or investigator bias seeping into conclusions reached in workplace investigations.¹⁷¹ In one such case, *Ribeiro v. CIBC*, the Ontario Superior Court of Justice found that the plaintiff’s manager, who oversaw an investigation into allegations of fraud, had predetermined conclusions at the beginning of the investigation and “was bound and determined to justify” a finding against the plaintiff.¹⁷² The Court went on to criticize the company’s fraud investigator, a former police officer, stating that he “started with a desired result and, thereafter, proceeded so as to support it.”¹⁷³ The Court further stated that the investigator was unable to remain

¹⁷¹ See Findley & Scott, *supra* note 116, at 294.

¹⁷² *Ribeiro v. Can. Imperial Bank of Commerce*, 1989 CanLII 4281 (Can. Ont. S.C.). Mr. Ribeiro turned down a friend, Mr. LeBlanc, who wanted a \$1,000 bank loan because he did not qualify. *Id.* at 39. Mr. LeBlanc subsequently returned with his girlfriend who applied for the loan. *Id.* at 9. The loan was granted and the girlfriend then lent the money to Mr. LeBlanc. *Id.* CIBC took the position that Mr. Ribeiro had engaged in fraud by lending money indirectly to a known unacceptable credit risk. *Id.* at 11. The court determined that there was no cause for dismissal and determined that the manager’s “attitude and demeanour was anything but that of an objective, open, and fair-minded executive that I expect would represent a Canadian chartered bank.” *Id.* at 44.

¹⁷³ *Id.*

objective “once pointed in the direction of a suggested or alleged wrongdoing” by the respondent/plaintiff.¹⁷⁴ The investigator went so far as to pursue information unrelated to the alleged fraud, such as possible former criminal activity, in an effort to confirm the plaintiff’s guilt.¹⁷⁵

*Elgert v. Home Hardware Stores Limited*¹⁷⁶ represents an extreme case of tunnel vision in which the employer and investigators carried out an investigation into allegations made against the plaintiff in a biased manner.¹⁷⁷ Elgert, a seventeen-year employee, was dismissed from his job as supervisor following an investigation into allegations of sexual assault made by two female employees.¹⁷⁸ After examining the investigation process, the Alberta Court of Appeal concluded that the investigation was carried out in a biased and bad faith manner.¹⁷⁹ In finding that the investigation lacked the requisite neutrality and thoroughness, the court noted the following flaws: the investigators’ close relations with management, the failure to interview relevant witnesses, the failure to consider possible motive or fabrication of the allegations, and refusal to provide particulars to the respondent in advance of his interview.¹⁸⁰ While ulterior motives may have played a role in the outcome of this investigation, it provides an example of the danger that commencing an investigation with a hypothesis can lead to a faulty and unfair conclusion.

In another case, *Tong v. The Home Depot of Canada Inc.*, the Ontario Superior Court of Justice concluded that the workplace investigator was “consumed” with building a case against the plaintiff and was successful in doing so.¹⁸¹ The court stated that an

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Elgert v. Home Hardware Stores Ltd.* (2011), 510 A.R. 1 (Can Alta. C.A.).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* Mr. Elgert brought a lawsuit against Home Hardware for wrongful dismissal and defamation. *Id.* The jury found that Mr. Elgert had not, in fact, committed the alleged sexual assault. *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Tong v. The Home Depot of Canada*, 2004 CanLII 18228, para. 16 (Can. Ont. S.C.). Mr. Tong, a sales associate, had worked at Home Depot for

investigation will be tainted where the in-house investigator commenced the investigation “with the firm belief that the [accused employee] was a wrongdoer.”¹⁸² Similarly, in *Ogden v. Canadian Imperial Bank of Commerce*, the British Columbia Supreme Court found that overall the defendant was not interested in using its investigation as a fact-finding mission but rather was “engaged in an exercise in case building against [the respondent/plaintiff].”¹⁸³

Confirmation bias may also play a role in cases where another person in the organization who may be biased against one of the parties influences the investigator. In *Reeves v. Safeway Stores*, the California Court of Appeal found that “the evidence raised triable issues as to the existence and effect of retaliatory motive on the part of the supervisor, and as to whether the manager and the

approximately five years when a new floor manager, Mr. MacDonald, was hired. *Id.* at para. 2–3. Mr. MacDonald concluded that Mr. Tong was taking longer breaks than permitted, a view he shared with the store manager who encouraged him to keep a watchful eye on Mr. Tong. *Id.* at para. 4–6. Mr. MacDonald kept Mr. Tong under almost constant surveillance during work hours. *Id.* at para. 7. Mr. Tong was given no opportunity to respond to Mr. MacDonald’s concerns or the chance to offer any explanation. *Id.* Mr. MacDonald did not interview a single employee about Mr. Tong and chose not even to speak to Mr. Tong’s supervisor. *Id.* at para. 14.

¹⁸² *Id.* at para. 11–12.

¹⁸³ *Ogden v. Canadian Imperial Bank of Commerce*, 2014 CanLII 285 (Can. B.C. S.C.). Ms. Ogden, a financial advisor at CIBC who immigrated to Canada in 2000, was terminated for cause following an investigation into a transfer of funds from China to her personal account on behalf of a client. *Id.* at para. 6, 15–16. At the time of her dismissal, she had a portfolio of \$233 million working with clients in the Chinese community. *Id.* at para. 14. Ms. Ogden transferred funds to her personal account in order to save a house purchase for the client. *Id.* at para. 16. She did not benefit personally benefit from the transaction, but her conduct was contrary to CIBC practice. *Id.* at para. 155. The personal wire transfer was discovered six months later. *Id.* at para. 196. CIBC appointed an investigator, following which Ms. Ogden was terminated for cause. *Id.* at para. 212–13. Ms. Ogden challenged the dismissal. *Id.* at para. 214. The Court found that CIBC did not responsibly investigate the allegations and could therefore not substantiate that cause for dismissal existed. *Id.* at para. 390–96. Moreover, the timing of the investigation was a deliberate attempt to deprive Ms. Ogden of a commission payment. *Id.* at para. 389. The British Columbia Supreme Court was highly critical of the investigation for many reasons, including the investigator’s purpose to procure admissions and prevent Ms. Ogden from fully answering questions. *Id.* at para. 413.

intermediate investigator acted as tools or ‘cat’s paws’ for the supervisor.”¹⁸⁴ The court stated that the evidence “supports an inference that [the] investigation of the alleged misconduct was not truly independent, but was heavily skewed to favor the ostensibly tentative conclusions of the reporting supervisor.”¹⁸⁵ This was based on language indicating that the investigator may have been predisposed towards confirming “disciplinary charges rather than objectively ascertain[ing] their truth.”¹⁸⁶

In *Nazir v. United Airlines, Inc.*, the California Court of Appeal found that the investigator assigned to investigate a discrimination complaint was a person “who at least inferentially had an axe to grind” with the complainant.¹⁸⁷ Further, the “assistant” investigator considered himself “an internal customer” of the lead investigator.¹⁸⁸ Thus, the *Nazir* court held that “[s]uch an investigation can itself be evidence of pretext . . . [and] such

¹⁸⁴ *Reeves v. Safeway Stores*, 121 Cal. App. 4th 95, 100 (Cal. Ct. App. 2004). Note that several cases, including a 2011 U.S. Supreme Court decision, have held that where a supervisor actively discriminates or retaliates against an employee, but convinces the decision-maker to terminate the employee for non-discriminatory/non-retaliatory reasons, there may still be liability on the employer’s part, notwithstanding that the actual decision maker acted without an improper motive (known as the “Cat’s Paw rule”). See *Staub v. Proctor Hospital*, 562 U.S. 411, 419–22 (2011). As the *Reeves* Court stated, “[if] a supervisor makes another his tool for carrying out a discriminatory action, the original actor’s purpose will be imputed to the tool, or through the tool to their common employer.” *Reeves*, 121 Cal. App. 4th at 113.

¹⁸⁵ *Id.* at 119 (emphasis added).

¹⁸⁶ *Id.* The Court cited the example of the investigator’s use of language in describing his general role when employees are accused of stealing to the effect of having a “solid case” against an employee rather than a more neutral construction. *Id.* It went on to point to his language of referring to the complainant as “victim” rather than complainant or accuser and the respondent as a “suspect.” *Id.* at 120. The Court further noted the respondent/plaintiff’s rendition of events is “presented as a story, while the [complainants’] version is presented as history” in the investigation report. *Id.* The Court also noted that the investigator used “vaguely disparaging language.” *Id.* The Court held that a fact-finder could find that the investigator failed to investigate exculpatory information and that the investigator may also have presented plaintiff’s case to management without describing the “numerous potential ameliorating circumstances.” *Id.*

¹⁸⁷ *Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 277 (Cal. Ct. app. 2009).

¹⁸⁸ *Id.*

investigation could ‘exploit a disciplinary process predisposed to confirm all charges.’”¹⁸⁹

There are numerous additional cases in which courts have concluded that workplace investigations were biased—cases in which the investigation was tainted by personal bias and self-interest;¹⁹⁰ cases where the respondent was provided no opportunity to respond;¹⁹¹ and cases in which the investigator empathized with witnesses’ statements, demonstrating an apprehension of bias.¹⁹²

¹⁸⁹ *Id.* at 277 (alteration in original). The *Nazir* court raised the point that this particular employer (United Airlines) had extensive rules and policies about the investigation of employee complaints. One of United’s policies stated that if “there is *any* reason you would *not* be perceived as an *unbiased* investigator, choose another investigator.” *Id.*; see also *Gee v. Principi*, 289 F.3d 342, 346 n.2 (5th Cir. 2002) (“If ultimate decisionmaker [is] influenced by others who had retaliatory motives, then [the] investigation cannot in any real sense be considered *independent*.”).

¹⁹⁰ *Quela v. Payco-General Am. Credits, Inc.*, No. 99 C 1904, 2000 U.S. Dist. LEXIS 6932, at *2 (N.D. Ill. May 17, 2000) (finding an investigation of sexual harassment allegations tainted by personal bias and self-interest when the investigator held a high managerial position, a person who aided in the investigation was the business partner of the accused, and pressure tactics were employed when interviewing a witness).

¹⁹¹ See *Downham v. County of Lennox and Addington*, 2005 Can LII 45197 (Ont. S.C.). The Court determined that the investigation was “biased, shoddy, and substantially undocumented.” *Id.* at para. 233(b). Plaintiff, Manager of Non-Profit Housing Projects with the Defendant, was terminated following investigation for breach of trust. *Id.* at para. 7. Bias appears to have arisen out of concerns around the plaintiff (who was an ordained minister for the Salvation Army) providing assistance to a convicted pedophile in finding public housing. *Id.* at para. 24–25, 30. Court found the employer “acted with bias and malice throughout this unfortunate story” by, *inter alia*, failing to interview plaintiff and rushing to a conclusion. *Id.* at para. 181.

¹⁹² *Lohse v Arthur (No. 3)*, [2009] FCA 1118, ¶ 53(f) (Austl.). In *Lohse*, an employee was demoted based on investigation argued denial of procedural fairness in investigation. *Id.* at ¶ 8. The court found the investigation biased because the employee was not fully advised of all allegations against him, was not provided with an opportunity to orally respond to the allegations, and investigator made comments empathizing with witnesses. *Id.* at ¶ 53(e). *But see Kohler v. Inter-tel Technologies*, 244 F. 3d 1167, 1181 (9th Cir. 2001) (determining that, based upon the well-executed investigation, as well as the employee’s failure to utilize the employer’s well-drafted grievance procedures, the employer had an affirmative defense to the allegations of sexual harassment that shielded it from liability).

These cases indicate that courts may scrutinize investigations to determine whether actual or perceived bias tainted an investigation. While these cases do not specifically refer to confirmation bias, it seems to have played a role, as the evidence suggested that the investigators sought to confirm initial hypotheses while ignoring alternatives. In most cases, however, cognitive biases of any sort will be difficult, if not impossible, for courts to identify because there will be no objective evidence of their existence, let alone how they impacted an investigation. Yet, workplace investigators committed to neutrality ought to be equally concerned about hidden biases as they are about more manifest biases.

IV. BIAS REDUCTION STRATEGIES FOR WORKPLACE INVESTIGATIONS

*“We should envision neutrality as an unending search, not a state of being.”*¹⁹³

Some research suggests that unconscious biases are, to some degree, malleable and can be overcome, or their impact diminished, at least temporarily.¹⁹⁴ Numerous measures show promise in overriding unconscious biases. A number of social psychologists assert that “aware[ness] of discrepancies between conscious ideals and unconsciously held negative stereotypes” is the first critical step “toward [eliminating] discriminatory belief systems,” depending on the “knowledge, guilt, and motivation to change one’s discovered unconscious biases.”¹⁹⁵

However, research also indicates that it is no easy task to purge unconscious biases from the decision-making process, as they are

¹⁹³ Izumi, *supra* note 24, at 22.

¹⁹⁴ Pollard, *supra* note 52, at 924; see Irwin & Real, *supra* note 53, at 8. “Irene Blair summarized a number of similar studies and concluded that implicit biases are malleable. For example, implicit gender stereotypes of feminine weakness were reduced by imagining examples of counter-stereotypic (i.e., strong) women.” Greenwald & Kreiger, *supra* note 6, at 963–64; see Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 828 (2001).

¹⁹⁵ Pollard, *supra* note 52, at 924; see Dasgupta & Rivera, *supra* note 88, at 277.

“particularly resistant to conscious efforts.”¹⁹⁶ Overcoming them requires significant effort. For implicit biases, people must recognize the stereotype when it is activated and have the motivation to control its activation and application.¹⁹⁷ People with low prejudices are more likely to be motivated to reduce the discrepancy between unconscious biases and internal belief systems.¹⁹⁸ As one commentator stated, “[i]n order to conform one’s behavior with one’s low-prejudiced belief system, one must inhibit spontaneous stereotype-based responses and deliberately replace them with belief-based responses.”¹⁹⁹ The research suggests that this is a gradual process like breaking a habit, the first step of which is awareness.²⁰⁰

This section will explore possible de-biasing strategies based upon social science research, as well as suggestions that workplace investigators can build into their own processes to help to reduce unconscious bias and the appearance of bias. It will also briefly explore whether retaining internal or external investigators, or regulation of workplace investigators might assist in reducing bias.

A. Bias Reduction Strategies as Shown in Psychology

1. Accessing a Counterstereotype

Several studies indicate that exposure to counterstereotype cues can reduce implicit biases in some circumstances.²⁰¹ One study

¹⁹⁶ Roberts, *supra* note 66, at 851 (quoting Levinson, *supra* note 51, at 361). One study of Dutch independent crime analysts used as a method to counter tunnel vision of Dutch police “found that their knowledge of the primary investigators’ theory of the case influenced them.” O’Brien, *supra* note 120, at 330. They were more likely to come to similar interpretations than were analysts blind to that information. *Id.* “This finding suggests just how difficult it can be to purge these biases from the decision-making process, even for people who are highly trained and motivated to be accurate.” *Id.*

¹⁹⁷ Blasi, *supra* note 100, at 1252–53.

¹⁹⁸ Pollard, *supra* note 52, at 949.

¹⁹⁹ *Id.* at 950.

²⁰⁰ *Id.* at 951; Izumi, *supra* note 24, at 141 (“Awareness of bias is critical for mental decontamination success.”).

²⁰¹ Blair et al., *supra* note 194, at 828; Blasi, *supra* note 100, at 1254; Izumi, *supra* note 24, 148–49; Pollard, *supra* note 52, at 953.

demonstrated that exposure to admirable members of a stigmatized group reduced automatic bias against that group.²⁰² The effect lasted at least one day.²⁰³ Other studies show that “participants who engage in counterstereotypic mental imagery produced substantially weaker implicit stereotypes compared with participants who engage[] in neutral, stereotypic, or no mental imagery.”²⁰⁴ The results suggest that implicit stereotypes are malleable, and that controlled processes, such as mental imagery, may influence the stereotyping process at its early as well as later stages.²⁰⁵

However, conjuring up a counterstereotype is not an elixir. Correction strategies “require significant cognitive resources” and, therefore, high levels of consistent motivation.²⁰⁶ Further, “overcorrection is a common problem” amongst “those who are motivated to avoid discrimination.”²⁰⁷ Such interventions may temporarily activate a *subtype* of a larger category. “Once activated, this subcategory would temporarily function as a mental replacement for the larger (and presumably more negatively valenced). . . category.”²⁰⁸ Suppressing stereotypes has also been found to be counterproductive because it can actually result in the

²⁰² Izumi, *supra* note 24, at 148–49.

²⁰³ *Id.* Other studies have reached similar results. See Nilanjana Dasgupta, *Seeing is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 645 (2004) (explaining that exposure to women in leadership positions can reduce implicit biases in women); see also Dasgupta & Rivera, *supra* note 88, at 268 (describing the results of studies showing “that, for both sexes, automatic prejudice produced biased behavior in the absence of conscious egalitarian beliefs and behavioral control” and that “[t]he presence of either conscious process eliminated behavioral bias”); Greenwald & Krieger, *supra* note 6, at 963 (finding that when “White and Asian-American undergraduate students . . . complete[d] . . . a preliminary task in which they identified a series of photographs of well-known and admired African Americans, . . . mixed with photographs of somewhat less well-known but thoroughly disreputable European Americans (terrorists and serial murderers) . . . [a] subsequent Race IAT measure revealed that this photograph-identification task reduced the level of automatic preference for European American (relative to African American)”).

²⁰⁴ Blair et al., *supra* note 194, at 828.

²⁰⁵ See Pollard, *supra* note 52, at 924; see also Blair, *supra* note 194, at 828.

²⁰⁶ Page, *supra* note 61, at 239–40.

²⁰⁷ *Id.*

²⁰⁸ Greenwald & Krieger, *supra* note 6, at 964.

“hyerpaccessibility” of the stereotypes and “increased stereotyping at the next opportunity.”²⁰⁹

While accessing counterstereotypes may not be a guaranteed method of reducing bias, there is some indication that it can assist at least on a temporary basis. Given this, it seems worthwhile for workplace investigators to invoke this technique before or during interviews and while assessing evidence in an effort to keep unconscious stereotyping from seeping into investigative findings.

2. Education and Training for Investigators

Studies show that training may also assist in countering unconscious biases for investigators.²¹⁰ To be effective, however, training programs must have relevant content and be consistent, continuous, and long-term, as most bias reduction strategies are only temporary measures.²¹¹ The most successful training will “focus[] on the cognitive processes that can lead to bias.”²¹²

Multiculturalism training in particular has been successful in reducing implicit biases against social groups.²¹³ In one study, participants exposed to multiculturalism training displayed lesser implicit bias on a black/white IAT than those who had been exposed to training based on color blindness, thus ignoring differences between groups.²¹⁴ In another study, participants in a fourteen-week

²⁰⁹ Page, *supra* note 61, at 241. In one study, “subjects were shown a picture of a ‘skinhead’ and asked to write an essay on his probable qualities,” having been instructed to avoid stereotypes. Blasi, *supra* note 100, at 1253. They successfully did so. *Id.* However, when the participants “were later exposed to a skinhead image, they were *more* likely than [the] control [group] to activate the stereotype.” *Id.* at 1253 (emphasis added).

²¹⁰ See, e.g., Springer, *supra* note 130, at 321 (demonstrating that “simply educating people about the existence of expectancy effects virtually eliminate[s] their existence in laboratory settings”).

²¹¹ See Greenwald & Krieger, note 6 *supra*, at 964; Page, *supra* note 62, at 242

²¹² Burke, *supra* note 121, at 522. One study found that a semester long diversity course significantly reduced automatic stereotyping with regards to race. See Page, *supra* note 61, at 242 n.446 (citing research showing that completing a diversity education program reduced implicit bias, at least temporarily).

²¹³ See Levinson, *supra* note 51, at 414–15.

²¹⁴ *Id.* at 415.

diversity training course that involved learning about intergroup conflict displayed less implicit and explicit bias than those in the control group.²¹⁵ Research has even indicated that simply taking the IAT and seeing the results can assist in addressing implicit bias.²¹⁶ This could be an appropriate starting point to educate workplace investigators about implicit bias by enabling an understanding of baseline cognitive biases so that they may compensate through their higher cognitive processes.²¹⁷

Notwithstanding the possible benefits of education and training, “the empirical evidence also suggests that cognitive bias is stubborn, and that education is an unlikely panacea.”²¹⁸ Indeed, similar to accessing a counterstereotype, studies indicate that certain bias reduction trainings might, in fact, heighten some biases.²¹⁹ Simply knowing one’s prejudice level is insufficient to respond in a less prejudiced manner; internal motivation is necessary.²²⁰ Training

²¹⁵ *Id.*

²¹⁶ *See id.* at 416.

²¹⁷ *See Roberts, supra* note 66, at 858, n.244 (discussing use of the IAT for judicial education); *see also* Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 38 n.203 (2010) (“Within the medical profession attention has been given to devising training programs geared towards eliminating bias-driven health care disparities. Enhance internal motivation to reduce bias, increase understanding about the psychological basis of bias, enhance providers’ confidence in ability to successfully interact with socially dissimilar patients, enhance emotion regulation skills and improve ability to build partnerships with patients.”).

²¹⁸ Burke, *supra* note 121, at 523.

²¹⁹ *See* Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1159 (1996).

²²⁰ Recent studies show that while stereotypes may be automatically *activated*, as conscious actors we may be able to affect the *application* of those stereotypes in our interactions, judgments, and decisions. Irene Blair and Mahzarin Banaji conducted a series of four experiments to observe the automatic activation of gender stereotypes and to assess conditions under which stereotype priming may be moderated under particular conditions. *See id.* They concluded that “stereotype priming can be eliminated when perceivers have an intention to process counterstereotypic information and sufficient cognitive resources are available.” *Id.*

would, therefore, have to be coupled with other de-biasing strategies incorporated into daily practice.

Given that workplace investigators are largely unregulated, any requirement to attend de-biasing training and/or to take the IAT, must be mandated, at least for internal investigators, by their employers. Otherwise, workplace investigators should seek such training out on their own. However, a deeper understanding of the psychological processes at play appears to be necessary to obtain any kind of lasting motivation and impact. While long-term training may assist, workplace investigators are largely unregulated and are not currently required to attend any sort of de-biasing training. For the time being then, it is incumbent upon individual workplace investigators to acquire such education themselves.

3. Appealing to Individuals' Beliefs in Equality and Fairness

Other studies show that “conscious processes such as the motivation to be egalitarian. . . can circumvent the effect of automatic prejudice on outward behavior.”²²¹ In other words, “conscious egalitarian beliefs can override the effect of automatically activated prejudice and prevent certain forms of behavioral bias.”²²²

Studies show that this can be accomplished by “priming subjects with fairness or egalitarian goals, activat[ing] unconscious cognitions [to] . . . counter the effects of the automatic activation of stereotypes, leaving the entire battle between fairness and prejudice to be played out at a subconscious level.”²²³ For example, one study showed that simply seeing or hearing the word “fairness” caused subjects to behave as though they were more committed to being fair.²²⁴ This suggests that workplace investigators or others who want to counter automatic stereotyping effects “should insert into their presentations as many contrarian priming words, pictures, and other stimuli as possible.”²²⁵

²²¹ Dasgupta & Rivera, *supra* note 88, at 277.

²²² *Id.*

²²³ Blasi, *supra* note 100, at 1254.

²²⁴ *Id.* at 1277.

²²⁵ *Id.*

Workplace investigators, as well as organizations who require investigations, might apply this research to their practices or policies, as well as any investigation training an organization might provide. For example, this might be done by incorporating the practice of writing “fairness” or “neutrality” on investigators’ note paper before interviews, incorporating those words into their opening statements made to interviewees, or simply making it part of their routine to consciously think about their egalitarian views prior to working on an important component of the case.

4. Considering Alternative Hypothesis or Why a Favored Hypothesis Is Wrong

Research also suggests that considering alternative hypotheses can counter cognitive biases.²²⁶ “[T]aking the extra step of actively considering evidence that points away from [a given] suspect shows promise as a simple way to counteract bias.”²²⁷ It “breaks the inertia” that comes from focusing exclusively on data that is consistent with an initial hypothesis. This may require investigators to articulate reasons that counter their own conclusions. Research also indicates that considering alternatives may “activate a mind-set that reduces bias in later, unrelated judgments.”²²⁸ Employers may assist in reducing bias in investigations conducted on their behalf by building these kinds of recommendations into their workplace investigation policies and procedures.

However, people argue against their own position reluctantly, and even when they do so, overconfidence in their positions is generally reduced but not eliminated.²²⁹ Further, some studies have shown that considering alternatives “can worsen bias when people

²²⁶ See Burke, *supra* note 122, at 523–24; Findley & Scott, *supra* note 116, at 388–89 (discussing how prosecutors can counter bias by stepping into their opponent’s shoes); O’Brien, *supra* note 120, at 329.

²²⁷ O’Brien, *supra* note 120, at 329.

²²⁸ Galinsky and Moskowitz found that study participants made to consider counterfactuals performed better later on the rule-discovery task, which requires people to resist the tendency to seek only evidence that confirms their initial hypotheses. “That is, people who considered how a situation might have turned out differently were less prone to bias in a later, unrelated task.” *Id.* at 317.

²²⁹ See Findley & Scott, *supra* note 116, at 352 n.371.

find it hard to generate plausible alternatives.”²³⁰ It may be particularly difficult for certain professionals to consider alternatives. Studies indicate that professionals such as police, lawyers, and judges, suffer from “blindness to alternatives.”²³¹ One example of this can be seen in a study of police trainees serving as mock investigators.²³² The trainees “received a piece of evidence that either confirmed or disconfirmed their prior suspicion against the suspect” in a homicide case.²³³ “Despite identical objective characteristics of the evidence, participants rated the disconfirming (vs. confirming) evidence as less reliable and generated more arguments to question its reliability.”²³⁴

To neutralize confirmation bias, a workplace investigator should recognize the initial hypothesis he or she creates and consciously

²³⁰ See O’Brien, *supra* note 120, at 330. In another study participants provided with a case vignette where there was a serious possibility of another perpetrator than the main suspect rated exonerating information no differently in terms of incriminating power than those who read a version in which the suspect had a clear motive and no other suspects were mentioned. See Ask & Granhag, *supra* note 137, at 478 (“The pivotal decision investigators must make regarding whether to further interrogate a suspect may be based on prejudgments of guilt, confidently made, but frequently in error.”). Similarly, Kurt A. Carlson and J. Edward Russo found that jury members tend to interpret information in the light of their previously held convictions rather than completely objective. See Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. EXPERIMENTAL PSYCHOL. 91, 100–01 (2001). Ask, Rebelius, and Granhag found that their participants had more faith in DNA, video, and identification evidence if it produced incriminating information compared with when the outcome of the same procedure was exonerating. See generally Ask et al., *supra* note 121; see also Rassin, *supra* note 120, at 154.

²³¹ See Rassin *supra* note 120 (finding that the estimation of the incriminating power of investigation findings by police officers, district attorneys, and judges was not affected by knowledge of an alternative suspect; a result that did not emerge amongst university students).

²³² Ask et al., *supra* note 121, at 1245.

²³³ *Id.*

²³⁴ *Id.* (“This asymmetrical scepticism was stronger for participants judging witness evidence, compared to DNA, and photo evidence, supporting the hypothesis that different types of evidence vary in ‘elasticity’—the extent to which subjective interpretations can be justified. Interestingly, the observed effects were not limited to the specific evidence in the case, but also affected the ratings of the type of evidence in general, suggesting that reliability criteria for witness information are highly malleable and sensitive to contextual influences.”).

step away from that hypothesis to consider alternatives, however unlikely they may seem. Beyond that, workplace investigators should also force themselves to *articulate* reasons that his or her conclusions may be wrong and other conclusions may be correct.

B. Building “De-biasing Tools” into Investigative Procedures

Workplace investigators may also help themselves reduce their own biases through the implementation of a set of investigative procedures and practices that incorporate “de-biasing tools.” Organizations may also build these kinds of tools into their policies and procedures to assist those who conduct investigations on their behalf (whether internal or external), as well as any training that they provide. These tools, if consistently implemented, may assist a workplace investigator in reducing biases at the conscious and unconscious levels, as well as the appearance of bias.

Some commentators have warned that the very informality of alternative dispute resolution (“ADR”) processes increases the likelihood of bias.²³⁵ However, other commentators have argued that an adversarial system is predisposed to bias because it “polarizes parties and forces them to dogmatically pursue their own interests.”²³⁶ By contrast, inquisitorial processes like workplace investigation avoid biasing pressures because they are founded upon the concept of “neutrality and a search for the truth rather than advocacy and a quest for victory.”²³⁷ In either event, it is clear that workplace investigators must do what they can to achieve neutrality

²³⁵ See, e.g., Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC’Y REV. 767, 789 (1996) (finding that ethnic and gender disparities are greater in mediation than in adjudication.); Izumi, *supra* note 24, at 103 (“Because formal adjudication explicitly manifests ‘societal norms of fairness and even-handedness’ through symbols (flag, black robe), ritual, and rules, the adversarial process counteracts bias among legal decision makers and disputants.” (quoting Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387–88)).

²³⁶ Findley & Scott, *supra* note 116, at 323.

²³⁷ *Id.*

and postpone judgment.²³⁸ To be sure, “suppression of stereotyped associations and engagement of non-prejudiced responses requires intentional attention, and effort.”²³⁹ Investigators need to act deliberately and consistently in implementing bias reduction strategies into each stage of their process. It is particularly important for workplace investigators to have these processes well established, as investigations often require a quick turnaround, leaving little time to reflect and often instilling pressure that may derail attempts to reduce bias.

1. Limiting Information Provided Pre-Interviews and Client Contact throughout Investigation

External workplace investigators ought to consider carefully how much contact to have with clients at the beginning and throughout the investigation. It may be that less is more in terms of avoiding actual bias, the appearance of bias, and unconscious bias. A client will often have a particular belief in the “correct” outcome for an investigation, which they may communicate to the workplace investigator when he or she is retained. This can create an “initial hypothesis” in the workplace investigator’s mind and lead him or her down the dangerous road of confirmation bias.

Workplace investigators would be well served to implement a provision into their retainer agreements that makes it clear from the outset the circumstances in which there will be client contact and for what purpose. Of course, this is not to say that workplace investigators ought to avoid necessary client contact. However, limiting the opportunities for discussion about the case while it is ongoing may help to avoid exposure to potentially biasing information from the client that may lead to tunnel vision.

In addition, workplace investigators ought to give thought to how much information they must learn prior to interviews. Investigators may be exposed to case information through the referral process, initial client contact, scheduling calls, and document review. When investigators are exposed to information about the underlying complaint early on, they risk forming early

²³⁸ See *id.* at 372.

²³⁹ Izumi, *supra* note 24, at 141.

hypotheses and biases that may grow stronger as a result of confirmation bias.²⁴⁰

There will certainly be times when a workplace investigator must have initial information to conduct an investigation properly. However, investigators should consider how much information is necessary and/or beneficial to review pre-interview, as opposed to reviewing it post-interview and following up thereafter if necessary.

Considerations will often be different for internal investigators, who may have at least some knowledge of the parties involved and the underlying dispute. It may be useful for organizations to carefully draft their policies and procedures to clarify such things as who is to conduct investigations, who is to have knowledge of the underlying complaint, and leave some level of discretion for referring a matter to an external investigator where the connection to the parties or the dispute increases the likelihood of bias.

2. Interviewing Practices

Workplace investigators, as well as organizations that employ investigators, should ensure that interviewing practices employed in investigations are consistent to reduce the risk of bias preventing a fair process or outcome. Investigators ought not rely upon memory in any way to reach their findings or conclusions in a case, particularly in light of the research on memory bias.²⁴¹ Instead, workplace investigators should take careful notes in interviews. The more detailed the notes, the better, particularly in a drawn-out investigation with numerous witnesses.

In addition, investigators should consider having a standard statement that they recite at the beginning of interviews both to provide clarity to the participants about the investigators' role as a neutral, and to remind themselves of the importance of neutrality and fairness in the investigation process.

²⁴⁰ See Powell, *supra* note 120, at 132.

²⁴¹ See Page, *supra* note 61, at 221 (showing studies that demonstrate how people tend to recall information in a biased manner and in conformity with their expectations); see also Findley & Scott, *supra*, note 116, at 312 (showing that a known hypothesis can bias the manner in which people search their memories for confirming information).

Further, investigators should always be conscious of the critical importance of listening during the interviews. Despite the popularity of the Reid Technique, the research indicates that listening to interviewees is more important than assessing visual cues in detecting truth and deception.²⁴² Further, taking the focus off visual cues may reduce lie bias. This means that an investigator should be listening to auditory cues and, more importantly, to how evidence is provided. “Facts that are vague, contradictory, or sketchy can be invalidated while other information, given in an honest and straightforward manner, without any attempt to hide or exaggerate, prove credible.”²⁴³ Recording interviews or using a verbatim reporter may be helpful to investigators in this regard.

Further, many studies indicate that utilizing open questions, as opposed to leading questions, can help minimize the detrimental effects of confirmation bias.²⁴⁴ The effect of confirmation bias is not observed in interviewers who adhere to open questions because they allow the “witnesses to talk, which in turn, masks any preconceptions about the event that the interviewer may have had during and prior to the interview.”²⁴⁵ Even where “confirmation bias occurs automatically when interviewers receive knowledge about a case,” investigators can “overcome this bias if . . . previously trained to . . . ask open questions.”²⁴⁶

In addition, workplace investigators must ensure that they are utilizing neutral language. Investigators should avoid making statements that may be interpreted as “sympathetic” to a witness, including “I can understand that,” “I’m not doubting that,” and “I agree.” This kind of language can backfire and have the effect of

²⁴² Kassin, *supra* note 150, at 810; *see* Vrij, *supra* note 155, at 1333.

²⁴³ Avitabile & Kleiner, *supra* note 145, at 222.

²⁴⁴ *See, e.g.*, Powell, *supra* note 120, at 131 (“Interviewers who were better at adhering to open questions . . . showed less of a detrimental effect of confirmation bias compared with interviewers who were poorer at adhering to open questions.”).

²⁴⁵ *Id.* at 127.

²⁴⁶ *Id.* at 131–32 (discussing the benefits of open questions, including “more accurate witness statements, longer witness responses, encourage[ing] witnesses to play an active role in the interview process, enhance[ing] witness’ perceptions that they were listened to, [and maximizing] story-grammar detail and thus victim credibility”).

suggesting the investigator does not have an open mind about certain matters, thus leading to an apprehension of bias.²⁴⁷ Eliminating these kinds of phrases will require effort for investigators who use such expressions in an unconscious attempt to encourage witnesses to trust them.

Finally, workplace investigators should avoid suggesting answers to interviewees. This is likely to be an issue for an investigator who conducts a time sensitive investigation or interviews a difficult witness who does not answer questions concisely or clearly. In these cases, an investigator may simply want to elicit evidence quickly, but this may taint the investigation as interviewees may be influenced by the suggested answers and thereby give inaccurate evidence.

3. Review of Evidence and Findings

Implementing a peer review process may also assist in ensuring that findings are supported. Involving others in the decision-making process provides a “fresh look” and may help to reduce cognitive biases that can lead to tunnel vision and, perhaps, wrong conclusions.²⁴⁸ This may be done by reviewing evidence obtained in an investigation with a trusted colleague, preferably without providing the investigator’s views, which could bias the colleague. Of course, confidential information must be protected in any such process.

Another useful process that may reduce bias relates to the manner in which evidence is laid out, particularly in cases involving large volumes of evidence where one may be particularly prone to neglecting conflicting evidence. One study found that a graphical evidence layout significantly reduced, though did not eliminate bias, as compared to an informationally equivalent text format. A graphical layout “makes the entire spectrum of evidence available and easy to assimilate, so that evidence across the spectrum, not just supporting evidence, stands a greater chance of being incorporated

²⁴⁷ *Lohse v Arthur (No. 3)*, [2009] FCA 1118, ¶ 53(e) (Austl.) (“Even if the evidence [of such language] . . . was not sufficiently strong to establish actual bias . . . it was sufficient . . . to draw a conclusion of apprehended bias sufficient to constitute a denial of natural justice.”).

²⁴⁸ Burke, *supra* note 121, at 525.

into a decision.”²⁴⁹ The authors of this study speculated that the graphical format was helpful because “it plays to the recognition-centred nature of decision making by making the full distribution of evidence constantly available and easy to access.”²⁵⁰

C. Does Retaining External Investigators Solve the Problem of Bias?

Some argue that bias is inherent where staff conducts internal investigations, as they have ongoing relationships with the organization, are dependent upon the organization for their livelihood, and often know the parties and inner workings of the organization involved.²⁵¹ Some commentators believe that this means that internal staff cannot be sufficiently separate from the organization for true independence in decision-making and will drive them to “predetermined outcomes.”²⁵²

Thus, many companies rely on external investigators where there would otherwise be a possibility or perception of bias if an internal investigator were used, including in cases involving allegations against a supervisor, where the internal employee has a relationship with one of the parties, or where sensitive allegations are raised that may harm the reputation of the company if true.²⁵³ In

²⁴⁹ Maia B. Cook & Harvey S. Smallman, *Human Factors of the Confirmation Bias in Intelligence Analysis: Decision Support From Graphical Evidence Landscapes*, 50 J. HUM. FACTORS & ERGONOMICS SOC’Y 745, 747 (2008).

²⁵⁰ *Id.* at 752.

²⁵¹ See, e.g., Harriet Stacey, *Addressing the Shortcomings of Workplace Investigations: A Response to Josh Bornstein’s Call for Reform*, CORRUPTION PREVENTION NETWORK 2 (June 2014), <http://www.corruptionprevention.net/assets/Uploads/Addressing-the-shortcomings-of-workplace-investigations.pdf> (“Internally conducted investigations were often subject to bias by the staff conducting the investigation.”).

²⁵² *Id.*; see also GUIDING PRINCIPLES, *supra* note 4 (“Employers may choose to use an in-house (internal) investigator. In such cases, the internal hierarchy of the organization should be considered to avoid the perception of biased or compromised objectivity.”).

²⁵³ See, e.g., Lisa Corrente, *Workplace Investigations: Key Reasons for Hiring an External Investigator*, CANADIAN ASS’N OF WORKPLACE INVESTIGATORS (2015), <http://www.caowi.org/key-reasons-for-hiring-external->

many ways, an investigation that has been conducted by an external investigator can be easier to defend than one conducted internally in terms of evidencing neutrality and avoiding at least the appearance of bias. It can be very difficult for an investigator who has an existing and ongoing relationship with the employer to be truly neutral and unbiased.

On the other hand, external investigators face issues “stemming from lack of industry standards [for those conducting workplace investigations] and bias resulting from the [i]nherent tension between independence and financial imperative to meet the needs of the client.”²⁵⁴ Further, if an organization repeatedly uses one or two investigators, these “externals” may face the same biases as internal investigators—knowledge of the inner workings of the organization, dependence upon the organization, and ongoing relationships with those who may impact their livelihood.

Ultimately, where there is any possibility of bias, a company would be best served by retaining an external investigator who has no stake in the outcome. This however will not necessarily eliminate the problem of bias, as both external and internal investigators will have unconscious biases. When it comes to unconscious biases, rather than actual or perceived biases, the more relevant determining factor may be what processes and tools the investigator has in place to reduce the seepage of unconscious biases into his or her investigations.

D. Would Regulation Assist in Reducing Bias?

It is important to consider whether increased regulation of workplace investigators could assist in reducing bias. As discussed, there is no governing legislation specifically applicable to workplace investigators. Although private investigators and lawyers are covered by their professions’ professional standards and rules of conduct, these do not address the unique issues that workplace investigators face.²⁵⁵

investigator (mentioning the need for impartiality and the impact on the company’s reputation, among others, as factors in hiring external investigators).

²⁵⁴ Stacey, *supra* note 250, at 2.

²⁵⁵ See Smiley, *supra* note 43, at 219.

There are many benefits to regulating an industry, including engendering the public trust. Without regulation and a unified code of conduct, workplace investigators and the public may be less likely to trust the process of workplace investigations. Without clear guidance, some may avoid the role altogether or “be forced to choose a guiding standard from a hodgepodge of other, often conflicting standards.”²⁵⁶ A unified code would inform investigators of their duties “while simultaneously accommodating the interests of the Bar, society, and the participating parties.”²⁵⁷ It may also impose a moral imperative to avoid bias or discrimination in investigations.²⁵⁸

Perhaps most importantly with respect to the issue of reducing unconscious bias, regulation would allow the imposition of certain minimum training requirements for workplace investigators. Lawyers and private investigators are required to have certain training within their own professions,²⁵⁹ yet that training is not geared towards the unique issues facing workplace investigators. While there are many certification programs and training programs for workplace investigators, there is no requirement for workplace investigators to participate. Therefore, investigators may be investigating serious matters of workplace misconduct without any relevant training whatsoever and certainly without training around bias. Of course, the training must then specifically address unconscious bias.

While regulation may serve many useful purposes, it would not be a complete solution for addressing unconscious bias in workplace investigations. Many other professionals, such as judges, are required to be impartial pursuant to governing ethical rules. And still, unconscious bias “can impair judges’ ability to align their conduct with what is ethical.”²⁶⁰ Ethical rules for such professions arguably need to be updated to address unconscious biases. Regulation of model rules of conduct for workplace investigators would at least provide a possible means for addressing the issue of

²⁵⁶ *Id.* at 246.

²⁵⁷ *Id.*

²⁵⁸ See Izumi, *supra* note 24, at 103.

²⁵⁹ See Smiley, *supra* note 43, at 219.

²⁶⁰ Roberts, *supra* note 66, at 839.

unconscious bias on a profession-wide basis. Without it, workplace investigators are left to their own devices, and perhaps the efforts of their employers, to understand these cognitive processes and to implement appropriate de-biasing tools into their practice.

CONCLUSION

Neutrality is essential to the role of the workplace investigator. The science around unconscious bias clearly indicates that even those workplace investigators with a strong professional commitment to neutrality are at risk of succumbing to automatic cognitive processes that can unconsciously lead to biased conclusions. It is unlikely that bias can be completely eliminated from the workplace investigation process, given the automatic nature and deep entrenchment of unconscious biases in the human psyche. Yet, if there is to be any hope of reducing such biases in workplace investigations, workplace investigators must recognize the multiple causes and manifestations of biases, and devise deliberate, consistent, and informed practices aimed at guarding against their detrimental effects.